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THE OLEOMARGARINE LAW:

A STUDY OF CONGRESSIONAL POLITICS.

THE time was when a discussion of great political questions aroused and attracted the attention of the whole people. The entire country was interested in and often electrified by the orations of Webster and Clay and Calhoun in Congress, or of Seward and Lincoln and Douglas on the stump. But the autocratic machine work of committees under the five-minute rule has abolished such debates in the House, and the editorial machine work of the daily press has supplanted those of the campaign; so that a grave and vital question in our national life may be decided and settled at the present time almost without the notice of the general public.

Legislation runs wild at our state capitals. Grant the doctrine that state laws may prescribe or prohibit certain drinks, and it is an easy step to interfere with or prohibit certain foods, as has been done in the case of oleomargarine. If this tendency continue, we of this generation may live to see laws passed to regulate our clothing or our religion, that will be as arbitrary as anything against which our forefathers rebelled. At Columbus, last winter, a bill was introduced to prevent any denizen of Ohio from eating meat slaughtered and dressed outside of the state limits. And at Springfield, Illinois, the coopers' unions sought the passage of an act to prevent the use of second-hand flour-barrels and butter-firkins.

Few voters have much respect personally for their representatives in our law-making bodies. The men whom we send to

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the city council or the state legislature or Congress are often the very last to whom we would entrust our private business, or whose advice and counsel we would seek in our daily life. Yet it is becoming a national habit to seek legislation as a cure for each and every new ill that arises, and all classes are clamoring for laws that they imagine will cure hard times or remedy individual impecuniosity. No thought is given to the axiom that the legislature (state or national) can contain no more wisdom than the sum of the knowledge and experience of the persons composing it. No note is taken of what is often true, that no single person in the legislature has any acquaintance whatever with the business matter upon which legislation is demanded. The result is that our troubles and perplexities are increased and multiplied as fast as legislation trespasses upon new and unknown territory.

The purpose of this paper is to consider the Oleomargarine law passed by Congress in 1886, which, during the debates upon the bill, was frequently termed "protection run mad." This enactment certainly marks a new era in our political history. It widens the sphere of sumptuary legislation, emphasizes the interference theory of government, and extends the doctrine of protection to domains never before reached in our history. The strength of this movement is shown by the large majorities which the bill obtained in the House and in the Senate, and by the apparently absolute acquiescence and approval of the whole country.

Under the rules of each House the "Act defining butter, *etc.*," was in charge of the chairman of its Committee on Agriculture; so that the debate was regulated by his dictation, and the allotment of time was generally in "chunks" of five or ten minutes. Thus the argument was necessarily of that broken and colloquial character destructive of forensic talent and display. Nevertheless, the discussions were exceedingly thorough, and a perusal will fascinate the political student. Their analysis shows that representatives and senators united to pass the bill under the influence of three different motives:

First, there were some who wanted the government to sup-

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press an article of food that they believed to be foul in its nature and deleterious to the public health, or, perhaps, a positive poison;

Second, there were many who desired to prohibit the sale of any article that entered into competition with butter; and

Third, there were those who wished merely to legislate against selling oleomargarine under the name of genuine butter, because of the deception involved in such a transaction.

To obtain an adequate idea of the tendencies and consequences of this sort of legislation, let us consider, in connection with the arguments, the facts in the case.

The voters of the first class were more numerous in the lower House. The Senate committee took a considerable amount of sworn testimony that pretty thoroughly exploded the arguments against oleomargarine on the ground of its composition. Few senators could have been influenced by the cry of "poison," for by the time the Senate voted on the bill it was perfectly clear that, on the score of healthfulness, the matter could as safely be left to the care of local boards of health and to municipal and state officials as the subject of "bob veal." What then was the evidence that stimulated the action of the House of Representatives?

(*a*) A presentation of the list of patents that had been taken out for the manufacture of oleomargarine; and

(*b*) The private analyses presented by scientific men, based upon samples which were labeled oleomargarine and butterine, originating no one proved where.

A moment's reflection will suffice to demonstrate that such evidence could have no standing before a justice of the peace, let alone a court of record. And that it was gravely accepted by the House of Representatives argues poorly for the mental capacity of its majority. The list of patents embraces all the idle experiments of "cranks" and all the failures of incompetents who had set up to produce oleomargarine by intricate methods and with the aid of a laboratory. There was no proof presented to show that a single one of the numerous patents in question was employed in the actual manufacture of oleomarga-

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rine. On the contrary, it was distinctly shown that the records of the Patent office had nothing to do with the case, because the manufacture of oleomargarine, as at present conducted, is a perfectly simple and open process known to everybody and free to all, covered by no patents and dependent upon neither acids nor chemicals. As for the analyses, no effort was made to prove the authenticity of the samples upon which they were based; no testimony whatever was demanded as to their origin; and subsequent developments make it absolutely certain that these samples must have been unfairly and unscrupulously concocted by the lobby that clamored for the passage of the bill. These subsequent developments may be briefly indicated by two circumstances:

(*a*) The Commissioner of Agriculture was a most earnest and enthusiastic supporter of the bill, in 1886, and a firm believer in the impurity of oleomargarine. In 1887 the Bureau of Agriculture issued a bulletin on the subject of oleomargarine, in which the following statement by Professor Atwater is endorsed as the sum and substance of the whole matter. It is particularly interesting to read, because the chairman of the Committee on Agriculture, who put the bill through the House, made these distinct and emphatic statements:

> There is no such thing as oleomargarine that is as wholesome in every respect as butter. . . . I do not agree that oleomargarine can be made palatable and wholesome as human food. Without a qualification I do not consent to that proposition.[1]

But here is the conclusion of Professor Atwater, endorsed by the Department of Agriculture:

> To recapitulate briefly, butter and oleomargarine have very nearly the same chemical composition. In digestibility there may be a slight balance in favor of butter, though for the nourishment of healthy persons this difference can hardly be of any considerable consequence. For supplying the body with heat and muscular energy, which is their chief use in nutrition, they are of practically equal value, excelling in this respect all other common food materials. Such, at any rate, is the practically unanimous testimony of the latest and best experimental research.[2]

[1] *Record*, 1st Session, XLIX Congress, vol. 17, pp. 5044, 5202.

[2] Division of Chemistry, Bulletin no. 13, part i, p. 24.

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(*b*) The law was filled with provisions for condemning and confiscating unwholesome oleomargarine product; but, after a year's experience, it turns out that not a single pound of it has fallen under the penalty.

The singular part of the proceeding is that no restriction was placed upon the use of unwholesome colorings and acids for renovating genuine butter. Salicylic acid is widely advertised as a preservative to prevent decomposition in straight butter, and boracic acid is also sold to arrest the progress of rancidity or disguise its presence. All medical authority unanimously condemns these acids as most injurious to health and conducive to disease. Their use, during the past two years, has greatly increased among dealers who repack and work over sour, strong and cheesy low-grade butter. Congress virtually put a premium upon this sort of manipulation by omitting to provide against it in case it was practised upon genuine butter made in the old-fashioned way; although, if practised upon oleomargarine, it constitutes a crime. About the first case that arose under the sanitary sections of the law was in Iowa in November, 1886. Sixty-six pounds of rancid butter were seized as oleomargarine by the Internal Revenue collector of the district. He was subsequently obliged to release the stuff because it was proved to be straight butter, although not at all attractive for table use. Under his auspices, then, scientific tests were made of eight samples, selected from various sources without the knowledge of the official chemist, with the following results:

Sample No. 1 — Chicago butterine — was pronounced good butter;
" " 2 — creamery butter two years old — was pronounced oleomargarine;
" " 3 — fresh butter salted 3 ounces to the pound — was pronounced good butter;
" " 4 — one-third lard — was pronounced good butter;
" " 5 — creamery butter salted 5 ounces to the pound — was pronounced good butter;
" " 6 — creamery butter churned at temperature of 73° — was pronounced oleomargarine;

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Sample No. 7 — one-half lard — was pronounced good butter;
" " 8 — unsalted creamery fresh from the churn — was pronounced oleomargarine.

Thus the tests determined the truth in only two instances out of eight.

By far the most important case that has arisen under the aforementioned sanitary provisions of the law was a quantity of genuine butter in Georgia. This butter was what is known in the trade as Norwegian butter, and was winter make. It was seized by the collector as oleomargarine, and at his instance it was analyzed and tested by the state chemist under the direction of the state agricultural authorities. It was pronounced unquestionably oleomargarine. An appeal to the laboratory at Washington and abundant affidavits from the makers and shippers subsequently proved the pedigree of the butter direct from the milk-pail. The shipment was released and an action against the collector for heavy damages is still pending in the Georgia courts. Of course the quality of the stuff had not improved during the period of attempted confiscation. These events illustrate the absurdity of the situation.

Let us now direct our investigation towards those legislators who voted for the Oleomargarine law in order to prohibit any sort of competition with butter. At first it seems strange that the ancient doctrine of protection should be extended so as to favor one *domestic* industry against another; that sumptuary legislation, which in some states and on some days prohibits certain drinks, should interfere now with articles of food; or that the paternal theory of government, which seeks to embrace our railroads and telegraphs, should descend even to the butter on our table. But such an innovation is like the first plunge into a cold bath: we soon get accustomed to it. Only, for fear some one may dispute my premises, let me present a few citations:

A member from New York (since promoted to the Senate) said:

> What then do we propose by this bill? We propose, under the constitution, if you please, to give incidental protection to the agricultural industries of the country. . . . Who is there who believes for a moment

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that oleomargarine would be sold in the markets of the United States if the purchaser knew the vile compound he was buying? . . . I grant, sir, this measure may possibly have the effect of stamping this industry out of existence.[1]

A member from Wisconsin (now deceased) said:

If I could have the legislation I want, I would make the tax so high that the operation of the law would utterly destroy the manufacture.[2]

The following is a condensation of remarks made by an alleged Solon from Iowa (since re-elected to the fiftieth Congress):

The manufacture of oleomargarine and butterine has not only threatened damage to the butter and dairy interests of Iowa and all Western states, but *it has already resulted in serious loss*. . . . It is not only unwise upon purely economic grounds, but it is unfair as a matter of honest dealing, either to permit or encourage any encroachment upon the legitimate field of agriculture; and in fairness to our agricultural classes, I think competition which involves imitation of any of their products should not be allowed. If imitation butter is permitted without restraint, it cannot be predicted what next in the line of imitation will follow; and if these damaging aggressions upon the old and stable province of the farmer are permitted, it may not be long until he finds his occupation seriously crippled. So I say let us "hold fast that which is good," and protect our farmers in that domain of industry. . . . Who that has lived upon the farm can for a moment fail to appreciate the importance to every farmer of preserving the domain so long by common consent assigned to him? . . . Readers of our legislative history well know how the representatives from agricultural sections of the country have stood loyally by the protective policy, and that, too, when it was perfectly apparent that the immediate and direct benefits resulting from the policy accrued to the manufacturers, and the more remote and indirect to the farmers. And I firmly believe and assert, in this presence, as my earnest conviction, that if the protectionists of the East stand loyally by the interests of the farmers and accord to them the direct protection they now so much need, they may be assured that the law of reciprocity will not be forgotten by the representatives of those who now ask for assistance.[3]

A Maine representative complained that

This oleomargarine is crowding out good butter.[4]

[1] *Record*, 1st Session, XLIX Congress, vol. 17, pp. 4871, 4872.
[2] *Ibid.*, p. 4927. [3] *Ibid.*, Appendix, pp. 170, 172. [4] *Ibid.*, p. 4977.

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A New-Yorker said:

I, sir, am in favor of protecting the dairy interests of America from competition with the manufacture of oleomargarine.[1]

Another:

This oleomargarine business is a bad business, and the sooner it is exterminated the better it will be for us.[2]

A Missourian with a national reputation said:

In my mind it may become a question whether the bill should not increase the tax on oleomargarine to such extent as will crush it out, if it be found that ten cents has not accomplished that purpose.[3]

A Wisconsin representative said:

I should regret the reduction [of the tax from ten cents] in fear that it might not accomplish the object that, I am free to say, inclines me to the support of the measure under consideration; for I fly the flag of an intent to destroy the manufacture by taxing it out of existence.[4]

A Californian said:

One of the objects is to seize upon an industry that we consider is undeserving of encouragement.[5]

And the chairman of the Committee on Agriculture in the Senate — the gentleman who piloted the bill safely through that distinguished body — made the following remarkable assertions:

I hope the legislation passed here will forever make such a fraudulent manufacture as the imitation of butter impossible in this country. I will state that frankly. . . . I do not hesitate to take the ground, here and now, that it is the duty of this government, when any considerable number of its people are threatened by some unexpected evil, to interpose its powerful arm and protect them. I hold that the protection of this [dairy] interest and this [dairy] industry is for the benefit of the whole people, not the farmers alone. Shall it be said that the government has no right to interfere for the protection of this great interest, even temporarily? I think not, Mr. President.[6]

Will not these grounds hold good to protect the manufacture of good old-fashioned rag-paper from the fraudulent manufac-

[1] *Record*, 1st Session, XLIX Congress, vol. 17, p. 5046.
[2] *Ibid.*, p. 4894.
[3] *Ibid.*, p. 5083.
[4] *Ibid.*, p. 5082.
[5] *Ibid.*, p. 5172.
[6] *Ibid.*, pp. 5340, 7081.

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ture of imitation paper from wood-pulp? According to similar arguments the strong arm of the government might be invoked to interpose in favor of the ragmen!

But the conduct of these legislators is not surprising in view of the demands of their constituents. Careful observation finds the whole transaction to be merely an ordinary exemplification of human selfishness and greed, acknowledging no restraint from any higher law. Even after the enactment of this law, the Iowa Butter and Cheese association pledged its members "to withhold their patronage from all stores, groceries or other establishments that take out licenses for the sale of oleomargarine," and provided for a "black list" by directing its secretary to obtain the names of dealers who took out licenses. Could there be any worse case of "boycott"?

The figures or statistics upon which this internal protective legislation was based were nearly as ridiculous as the so-called evidence that oleomargarine was poisonous. There were some indications that the sale of oleomargarine in this country had reached one hundred million pounds during the preceding twelve months. On the strength of this it was stated, as an undisputed fact, that two hundred million pounds had been sold; and some ardent advocates of the law declared the production to be three hundred million pounds. Under a two-cent tax the production for the first twelve months of the enforcement of the law will barely exceed thirty million pounds; and it is now apparent that the production never at any time reached one hundred million pounds per annum.

The cost of the lowest grade of oleomargarine was undoubtedly about eight cents per pound. Starting from this basis, the speech-makers at first declared the cost to be seven or eight cents per pound; and, as their enthusiasm waxed strong, the cost was asserted to be six cents; and finally five cents was estimated to be the correct cost of production. As a matter of fact, the cost of the highest grades of butterine (or oleomargarine) was often twenty cents per pound, and the actual average cost of the entire production of the article during the twelve months prior to this legislation was about twelve cents per pound.

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The number of manufacturers was stated to be between three hundred and five hundred; but when the law went into effect only thirty-seven were found to take out licenses.

The number of farmers who were being ruined by oleomargarine was stated to be five millions at the beginning of the discussion. This number grew to seven and eight millions before the final vote was taken in the lower House. But at the opening of the debates in the Senate the philanthropic senator from New Hampshire announced that the welfare of twenty-five millions of people was at stake. The intimation that half the population of the United States was dependent upon butter-making for existence is too absurd for comment.

The value of all the cows needed to furnish milk for the inhabitants of this country (including our large cities) and to furnish milk for our countless cheese-factories was added to the value of those necessary to provide the single item of butter. To this was added the value of all stock used to furnish butcher's meat for the whole United States, and the cattle on the ranches and ranges of the far West were all included. Then the value of all the farming lands in the country and of the barns upon same, together with the wild lands of the territories used for grazing, was estimated and added. And the value of all the cheese-factories and milk-wagons in the country was figured up, as well as the cost of creameries and dairies. The sum total of these values was called two thousand millions of dollars; and it was announced that this vast sum was at stake and liable to destruction or total loss if oleomargarine was permitted to exist. Applying such statistics with whip and spur, the chairmen of the Committees on Agriculture in both Houses rushed the bill through, with the avowed determination of enhancing the price of butter for the sole benefit of those engaged in the manufacture of this one article. I see no reason why the same arguments will not apply to suppress and abolish all labor-saving machinery, all new inventions, and all competition against any established industry that is sufficiently powerful to command the necessary number of votes. In the House of Representatives the result was 177 yeas, 101 nays

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and 45 absent. In the Senate it was 37 yeas, 24 nays and 15 absent or not voting.

The third group of advocates of this measure is the only class that is entitled to our respect, *viz.*, those who were willing to go to any length to prevent oleomargarine from being sold under the name of butter. Notwithstanding the weighty objections to the appeal for Federal interference in such a matter, there is an innate sense of honesty among good people that sympathizes with the idea of calling things by their right names. I hope that this third group was far more numerous than either of the others; but there is no way to determine the fact. When a member from Pennsylvania said: "How much oleomargarine and butterine would people consume if sold for what they really are? I venture to assert that not one million pounds would be manufactured," [1] he was but a sorry prophet. Yet he struck the keynote of the opposition to oleomargarine among thinking people; for, undoubtedly, the largest portion of the product up to that time had been marketed under false pretenses. The member from Delaware (who was not re-elected) proved himself entirely unfit for a legislator when he said: "Let people know what they are buying, and my word for it, no man is so poor, and I trust no man will be so mean, that he will feed his children upon such stuff." [2] A member from Iowa was guilty of a falsehood in saying: "The fact is, as shown by all testimony, that it will not sell when known. No one buys it knowing what it is." [3]

In truth, just as there are annually sold and consumed in the United States millions of gallons of water artificially charged to imitate the naturally effervescent product of medicinal springs, without harm and with much benefit to the masses of the people, so also, since November 1, 1886, there have been sold, for exactly what it is, about thirty million pounds of oleomargarine,[4] to the great benefit of the laboring classes, who could not afford

[1] *Record*, 1st Session, XLIX Congress, vol. 17, p. 5128.

[2] *Ibid.*, p. 5047. [3] *Ibid.*, p. 4901.

[4] The Report of the Commissioner of Internal Revenue (July 21, 1887) shows 21,800,000 lbs. in eight months: Nov. 1, 1886 — June 30, 1887. This period includes the busy season for this product.

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to buy genuine butter and who find in the new product a most acceptable substitute.

The fault lies in singling out oleomargarine as the one article to be taxed and licensed and subjected to the organized system of espionage necessary in the Internal Revenue department. Why do not the advocates of the Oleomargarine act vouchsafe us some reason for omitting bogus cheese? There are dozens of imitated and sophisticated food-products worthy of attention, but cheese is closely allied to butter. There are millions of pounds of skimmed-milk cheese sold annually in the United States as "full cream." Moreover, there is a considerable and growing product of cheese-oil that is sold to the cheese-factories of the dairy districts to supplant cream in their processes of manufacture. Cheese-oil is very similar to "oleo" oil, and is produced from exactly the same material, — beef-suet. Are we not entitled to some explanation from our law-givers on this point? But none is afforded us.

It is to the interest of the manufacturer to have his oleomargarine sold for exactly what it is. When he produces a better and more palatable article than ordinary country butter, he does not wish it to be sold to the consumer as butter. He does not want the credit and reputation, to which he is entitled for producing a good standard article at a reasonable price, to be given to the dairyman. Nor, on the other hand, when a slovenly farmer markets a dirty, greasy article in the form of butter, does the oleomargarine maker desire to be burdened with the suspicion that this disagreeable product came from his factory. But is this a proper matter for the attention of Congress? Are the clauses of the constitution relating to the "general welfare" and to "regulation of commerce between the states" to be construed as including these matters of domestic detail?

When the bill passed both Houses of Congress it would seem that the President hesitated to sign it. When he finally did so, he sent a special message to Congress expressing some of his misgivings. A Washington paper contained this squib:

> Owing to the crowded state of our columns, we must decline to comply with the request of "a Jacksonian Democrat," who asks us to repro-

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duce the full text of the President's oleomargarine message. We will, however, give a fair digest of that remarkable state paper, condensing from memory: For many obvious reasons this bill should not become a law. I therefore return it approved to the body in which it originated.

Since the bill became a law the oleomargarine manufacturers have not demanded its repeal. With the timidity and cowardice universally characteristic of commerce, they have submitted to what seemed inevitable. Bowing to the doctrine of expediency, they have asked only for a few amendments in the matter of licenses and minor regulations. On the other hand, the more violent advocates of the measure, being quite discontented with its results, were moving to procure more legislation at the short session of the forty-ninth Congress last winter. Bills were then introduced to prohibit the manufacture of oleomargarine absolutely. The price of butter has been much lower since the passage of this law than before. The masses persist in going without butter when they cannot afford it or have no money to buy it — and more legislation is demanded. Children are spreading their bread with syrups or "sauce," and the butter trade is no better off than before the law was passed. Butterine and oleomargarine have poisoned nobody, and are being sold for exactly what they are, but appeals are being prepared to influence Congress in favor of more laws. Is it not time for thinking citizens, who are selfishly interested neither in butter nor oleomargarine, to inquire: Whither are we drifting? Has not every individual voter an interest at stake? Are not dangers threatening all of us from the precedent that has been established by the Oleomargarine law?

HENRY C. BANNARD.

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THE CONSTITUTION OF THE UNITED STATES IN RECONSTRUCTION.[1]

THE doctrine of state sovereignty perished in the destruction of the Confederate armies. With that dogma our constitutional law ceased to have any concern. Its principle was antecedent to and above the constitution. State rights, on the other hand, were, under the theory of national sovereignty, determined by the constitution itself. Before the war the scope of the powers assigned to the states had been influenced much by the state-sovereignty theory. The pressure of the government's peril during the rebellion, however, had caused a natural reaction, and many of the most widely recognized attributes of state authority had been assumed by the general government. With the assured success of the Federal arms, a distinct definition of the rights of a state under the new situation became a matter of the first importance. The working out of such a definition was the main problem of reconstruction.

Inextricably involved in this leading legal question, was an even more troublesome practical difficulty. What was, and what should be, the civil and political status of the Southern blacks?

The definition of state rights first presented itself as a vital political issue when Federal authority began to be firmly re-established in the rebellious communities. In the course of the year 1863 the military situation in Tennessee and Arkansas seemed to justify the President in taking the preliminary steps towards the rehabilitation of those states with civil authority. His message of the 8th of December may be taken as the beginning of the process which only terminated with the withdrawal of the Federal troops from Louisiana and South Carolina by President Hayes in 1877. Between the close of 1863 and the end of hostilities no important progress was made towards

[1] *Cf.* the article entitled "The Constitution of the United States in Civil War," POLITICAL SCIENCE QUARTERLY, June, 1886.

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a solution of either of the great problems which were now plainly confronting the nation. All phases of the matters were freely discussed, but the President and the legislature were unable to agree upon either the fundamental principles of a theory or the details of a practical measure. The immediate end sought at this time was the restoration to political rights of the people of the regions fully in the possession of the Federal forces. To effect this purpose a clear conception of the exact status of the districts in question was requisite. As to this status there were wide differences of opinion. Without considering at this point the various theories proposed, it will be well to sketch the public acts of the three departments which had had a bearing on the question at issue. Succinctly put, the question was this: Had the rebellious communities any rights as states under the constitution?

A review of the *executive* acts presents the following result: In his inaugural, President Lincoln stated his conviction that the Union could not be broken by any pretended ordinance of secession. This view was reaffirmed in his first message; his non-intercourse proclamation of August 16, 1861, declared not the states, but the inhabitants of the states mentioned, to be in insurrection against the United States. In all the executive ordinances the illegal proceedings were assumed to be the acts of assemblages of individuals, and not the acts of the corporate states. A most important deduction from this theory was that the loyal element of the Southern people would be exempt from the penalties of the insurrectionary transactions. It was this element, indeed, which Lincoln adopted as the basis of the reconstruction measures which he proposed in 1863. On the day Congress met, December 8, he issued a proclamation, the preamble of which recited the subversion of the state governments by persons in rebellion and hence guilty of treason, and the desire of certain of these persons to reinaugurate loyal governments "within their respective states." An oath was prescribed, the taking of which was to be a satisfactory proof of loyalty, and the President pledged himself to recognize any state government formed under certain conditions by a number

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of loyal persons equal to one tenth of the voting population in 1860. Mr. Lincoln was thus true to the position assumed at the outbreak of the war. Nor did he recede from this position up to the time of his death. The executive department, in short, was fully committed to the doctrine that the corporate existence of the seceding states was not interrupted by the war.[1]

If we review the course of the *legislature* in its bearing on this question, we find up to a certain point a similar result. The act which provided for the definite recognition of the existence of a state of war, that of July 13, 1861, empowered the President to declare intercourse suspended with the inhabitants of certain enumerated districts, and gave no intimation that the states, as such, were concerned. In imposing the direct tax of twenty millions in 1861, the seceding states were assigned their proportionate share,[2] and by a later law[3] the amounts thus assigned were made a charge upon the land in the respective states. Further, the creation of West Virginia was valid only on condition that the consent of Virginia was obtained; and we find, in the law erecting the new state, that the legislature of Virginia did give its consent.[4] Many other instances might be adduced to illustrate the attitude of Congress toward the question of state existence in the early days of the war. It certainly was one with the President in according to the state a being incapable of destruction by any unconstitutional organizations of its inhabitants.

But there came a time when symptoms were manifested of a change of heart in the majority in the legislature. With the brightening prospects of the military situation, the anxiety to secure firmly the settlement of the slavery question led to a closer examination of the consequences that might flow from too strict an adherence to a theory better adapted perhaps to a time of doubt than to a time of certain success. The subject of state status became very prominent through the steps toward restoration announced by the President in his message in December of 1863 and the accompanying amnesty proclamation.

[1] See Lincoln's speech just before his death; McPherson, Rebellion, p. 609.
[2] 12 Statutes at Large, 295. [3] *Ibid.*, 422. [4] *Ibid.*, 633.

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So pronounced a movement towards the realization of the old state-rights doctrine aroused all the radical elements. It was feared that Mr. Lincoln would be lax in exacting satisfactory conditions from the reorganized communities. A bill was accordingly brought in, and after long discussion passed, enacting much more stringent conditions of restoration of governments than those contained in the President's plan, and making Congress and not the executive the ultimate authority on the question of recognition. The principle of the bill as passed was not different, in respect to the matter under discussion, from that adhered to by the President. The rebellious states were regarded as having lost their governments through insurrection within their limits, and it was assumed as the duty of the Federal government, under the clause of the constitution directing the guarantee of a republican form in each state, to declare when such a form existed. The whole plan of the bill, however, fell through, by the President's withholding his signature till the adjournment of Congress. He thereupon issued a proclamation stating his objections to the bill, and renewing his encouragement to the loyal people of the states in the reorganization of their governments.[1]

Meanwhile, in consequence of the practical application of the President's plan in Louisiana and Arkansas, the question had been presented to Congress in another shape. An organization had been effected in each of those states in accordance with Lincoln's proclamation, and credentials were accordingly presented to each House of persons claiming to represent the restored states. It became necessary for the Houses to pass on the rightfulness of the claims. The Senate Judiciary committee reported adversely to the admission of the claimants from Arkansas on the grounds, first, that the President's proclamation declaring the inhabitants of Arkansas in a state of insurrection had not been revoked; and second, that the supremacy of the military power in the state precluded the possibility of a civil organization that should be republican within the meaning of the constitution. In the House, the committee

[1] McPherson, Rebellion, p. 318.

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on elections reported favorably on the Arkansas claimants, but no action was taken on the report. Nor was any expression of opinion made by the thirty-eighth Congress on the vital point of state status.[1] Resolutions without number were offered, embodying all conceivable shades of belief on the issue, but, after eliciting much discussion, they were invariably consigned to a permanent resting-place on the table, or to a quiet grave in some committee.

There was a reason for this persistent ignoring of so important a question. The sentiment in favor of an absolute settlement of the slavery question had resulted in the submission to the states of the thirteenth amendment; and it was evident that until its adoption had put the question of slavery beyond the reach of the states, no further and conclusive steps toward restoration should be taken. But the Congress expired before the fate of the amendment was known, and shortly afterwards the collapse of the Confederacy left the Federal authority in the South supreme, but without any clear legislative expression as to the extent of that authority. It appears, then, that although the legislative department of the government had not, like the executive, consistently affirmed the persistence of the state entities as political units in our system, it had not, up to this time, rejected the theory.

The view held by the *judiciary* with respect to the war was first enunciated in the prize cases, decided in 1862. While a difference of opinion was manifested on the question, *when* an actual state of war began to exist, the Supreme Court was unanimous in its judgment as to the nature of the conflict. It was recognized as a military assertion of the authority of the

[1] The debates in the last session of this Congress afford abundant evidence that the doctrine of the continuous existence of the states that had seceded was losing ground. The reconstruction bill of 1863–4 contained clauses abolishing slavery in the rebellious districts. It had been a universally accepted principle that Congress had no power to enact any such law in respect to states. The passage of the act was due in part to the theory that no states existed in the regions designated. Many supporters of the bill, however, considered that the war power was a sufficient basis for the provision, and that no consideration of state status was involved. The wording of the emancipation clause itself is: "All persons held to involuntary servitude or labor in the *states* aforesaid are hereby emancipated and discharged therefrom."

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general government over the inhabitants of certain states and districts. "Congress," the decision declares, "cannot declare war against a state or any number of states, by virtue of the constitution."[1] Nor has the President any power to initiate or declare a war of any sort. He is only authorized by law "to suppress insurrection against the government of a state, or of the United States." The individuals conducting the present insurrection have taken advantage of the peculiar constitution of our system, and have "*acted as states* claiming to be sovereign"; but nowhere in either of the opinions is any recognition given to the idea that the states as known to the constitution are concerned in the war. Again, in the case of The Venice,[2] Chief Justice Chase describes the government's policy as embracing no views of subjugation by conquest, but as seeking only "the re-establishment of the national authority, and the ultimate restoration of states and citizens to their national relations." There appears to be no indication, then, that the judiciary ever doubted the constitutional existence of the states. Circumstances had disarranged their relations with the Federal government, but with the correction of the disturbance the former conditions would be resumed.

From the foregoing review of the attitude of all the departments of the United States government, it seems unquestionable that, while the necessities of war had made sad havoc with the rights of the states as well as of individuals, yet upon the return of peace a resumption was contemplated of the *ante bellum* status of both, subject only to such modifications as the now undisputed sovereignty of the nation should impose.

As to the status of the negroes, the whole question was in hopeless confusion. Under the operation of the Emancipation proclamation of the President and of the various acts of Congress containing provisions in reference to the subject, the number of freedmen dependent upon the government had become enormous. The exact status of these dependents was not determined. Besides those in the insurrectionary states who had been freed by the confiscation acts and the President's

[1] 2 Black, 668. [2] 2 Wallace, 278.

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orders, under the war power, the Border states had contributed to swell the number through the operation of other measures. A most effective means for freeing the slaves even of loyal masters had been the employment of the negroes for military purposes. The enrollment act of 1864[1] had provided for the drafting of "able-bodied male colored persons" into the army, granting freedom to all so drafted, and awarding compensation to loyal owners. The joint resolution of March 3, 1865,[2] proclaimed free the wives and children of all persons who had been or should be mustered into the military or naval service of the country.

Already, however, the thirteenth amendment had been submitted to the states, and the substantial certainty of its ratification rendered futile the loud protests against the constitutionality of such acts.

The care of the freedmen became early a subject of considerable importance. Commanders were seriously embarrassed by the great crowds of improvident blacks that attached themselves to the armies in their campaigns. It was not considered just to the Southern slaves to give them their freedom and then leave them to be re-enslaved as soon as the national forces had gone by. Such a course indeed would have been impossible, since the freedmen themselves instinctively refused to stay. The Border states protested vigorously against the influx of paupers to burden their already oppressed taxpayers. Private philanthropy took in charge the work of civilizing on the spot, but always under the protection of the army, such of the unfortunates as could be assembled at various points along the borders of the Confederacy. In 1865 the whole matter was systematized by the establishment of a bureau in the War department[3] to have control of all subjects relating to refugees and freedmen from the territory embraced in the military operations of the war. The existence of the bureau was limited to the duration of the rebellion and for one year thereafter. It was evidently the belief that the supervision of the general government would accomplish its object within a year after the

[1] 13 Statutes at Large, 11. [2] *Ibid.*, no. 29. [3] *Ibid.*, 507.

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cessation of hostilities, and that then the freedmen could be relinquished to the normal operation of the laws. Such, at least, was the view of the conservative Republicans, who hesitated to convert the Federal government into a permanent dispenser of charity. The act was regarded as based entirely upon the war power of the government, and was accordingly limited in its duration to the state of affairs which justified the exercise of such power.

Little more than a month after the passage of the bill, the Confederacy fell. The whole South came under the domination of the armies of the United States, and by the operation of the President's orders all the slaves in those regions became *de facto* free. Whether or not they rose immediately to a position of legal equality with their former masters was an unsettled question, now to become of the first importance. But whatever their rights at this period, the authority to which they looked for a guarantee of those rights divided them distinctly from the other race. As has been indicated above, a reorganized state jurisdiction was to regulate the affairs of the restored commonwealths; but for the freedmen a bureau of the United States War department had the indefinite jurisdiction implied in the words "the control of all subjects relating to refugees and freedmen from rebel states." The status of the negroes thus seems to have been practically that of wards of the Federal government, with rights totally undetermined.

Restoration of the States.

Upon the theory which has been shown to have been recognized in the conduct of the war, the problem of restoration was apparently simple. The instant the state of insurrection ceased which had given rise to the attitude of belligerency toward the inhabitants of the rebellious regions, *ante bellum* relations were resumed, in so far as not modified by Federal legislation during the war. That no such special modification had been effected in the relations of the insurrectionary states, had been assumed by all the departments of the government.

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But as to the individuals in rebellion, certain important measures had been passed. Most prominent were the provisions of the Confiscation act of 1862, which declared severe penalties upon such persons. By section thirteen of this act, however, the President was authorized to extend amnesty and pardon at his discretion, "to persons who may have participated in the existing rebellion in any state or part thereof." It was therefore left to the executive to relieve individuals from the consequences of their crimes so far as he saw fit. In pursuance of this authority, Mr. Lincoln had issued his proclamation of amnesty in 1863, prescribing a form of oath, the taking of which would restore to his normal relations a person who had incurred the disabilities resulting from participation in the rebellion. The nucleus of loyal citizens thus secured in any state was competent to take the steps necessary to the organization of a government for the state. Nor did it matter that they were a minority — even the one-tenth that the President fixed upon arbitrarily as the requisite number. The guaranty of a republican form would warrant the protection of the national authorities against an overwhelming majority in opposition to such a form.

Lincoln's great anxiety was to get something in the nature of an organization to recognize, without being over-critical as to how it was secured. He felt that consistency required that the impulse to commonwealth organization should come, nominally at least, from the people of the unsettled community. His proclamation accordingly contained no mandate of action, but merely declared the circumstances under which he would recognize a government in any state. These circumstances were the formation of a governmental organization by persons having subscribed to the oath of allegiance to the United States, and having pledged themselves to support the acts and proclamations promulgated during the war in reference to slavery. It is true that these terms were practically conditions imposed upon citizens of states as prerequisite to the exercise of their rights. But the plan, as Lincoln states in his message,[1]

[1] McPherson, Rebellion, p. 147.

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was merely presented as a rallying point, which might bring the people to act sooner than they otherwise would, and was not intended as a final solution of all the delicate questions involved. In no rebellious state, save Virginia, was there a government whose members possessed the most fundamental qualification for legitimacy — namely, that secured by having taken the oath prescribed by article six of the constitution.[1] To obtain such a government was Lincoln's main object.

In Louisiana and Arkansas he was successful. Congress, as has already been stated, declined to commit itself to such recognition of these governments as would have been implied in the admission of members chosen under their auspices. But under executive protection their organization was maintained till reconstruction began. In Tennessee, where there was a very strong Union sentiment, Andrew Johnson, in the capacity of military governor, had effected an organization in time for the Presidential election of 1864. The government thus established also continued through the period of restoration. Upon the collapse of the Confederacy, Lincoln's successor devoted himself to the inauguration of a like plan in the other states. In Virginia, where a shadowy loyal organization still existed, the President simply proclaimed his purpose to carry out his guarantee of a republican form of state government by supporting the measures of this authority.[2] By the same order, the administration of all the departments of the general government was put in operation throughout the state.

Three weeks later Johnson's amnesty proclamation was issued. It followed Lincoln's closely in tenor, but was in general more stringent and more pronounced in tone. Accompanying the amnesty manifesto was issued the order to put in operation the plan of restoration in North Carolina, and at intervals up to the middle of June successive proclamations inaugurated the system in all the other rebellious states, ex-

[1] "The members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution."

[2] Proclamation of May 9, 1865.

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cept Tennessee, Arkansas, and Louisiana, where the President recognized the Lincoln governments. Johnson evidently aimed at operating on exactly the same theory as his predecessor. In the preamble he marks out the constitutional basis of his action: The United States must guarantee a republican form of government, and protect each state against invasion and domestic violence; the President is bound to see that the laws are executed; rebellion, "now almost entirely overcome," has deprived the people of the state of all civil government; it is therefore necessary and proper to carry out and enforce the obligations of the United States to the people of the state. In consequence of these principles and facts, the President and commander-in-chief of the army and navy appointed a provisional governor for each of the disturbed states, with the duty of securing the re-establishment of the constitutional order. In the appointment of this special officer, Mr. Johnson followed the action of Mr. Lincoln in the case of Tennessee. The duty of the provisional governors was laid down in the same terms that had been employed in Lincoln's instructions to Johnson when the latter held the office of military governor.[1] They were directed to prescribe rules for the calling of a convention of delegates chosen by the loyal people of the respective states, and "to exercise all powers necessary and proper to enable such people to restore the states to their constitutional relations to the Federal government." The test of loyalty was subscription to the oath of amnesty as set forth in the President's proclamation, and a prerequisite of voting was the qualifications of an elector under the laws of the state in force immediately before the act of secession. Further, the President decreed that the convention, "or the legislature thereafter assembled, will prescribe the qualification of electors, and the eligibility of persons to hold office under the constitution and laws of the state, a power the people of the several states composing the Federal Union have rightfully exercised from the origin of the government to the present time."

In these electoral conditions was embodied the principle which

[1] McPherson, Rebellion, p. 436.

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developed in an instant a centre of antagonism to the President. It had already become a cardinal doctrine of the radical Republicans that the necessary corollary of emancipation and abolition was enfranchisement of the freedmen. By assuming the suicide of the states, they had removed all constitutional obstacles to the realization of this doctrine by the general government. But here was a declaration by the President that the whole matter was to be left to the Southern whites; and the fate of negro suffrage in such hands was not doubtful. Around this rallying point, then, were speedily grouped all the elements of opposition to the President's policy. The conviction that the emancipated race, made by circumstances the wards of the nation, ought to continue under the nation's care, was common to all. But opinions as to the means of effecting this were of all degrees of diversity. Conservatives considered that if the civil rights of the blacks could be guaranteed by the general government, the political privileges could be left to the states. To assume this guarantee by law involved grave questions of constitutionality; to fix it by constitutional amendment necessitated a previous determination of the status of the rebel states. In view of the difficulties that beset every plan that was suggested, many were inclined to give the President's experiment a fair trial, that the data thus obtained might be utilized in future adjustment.

In the midst of all the conflict of judgment, however, restoration on the line of the proclamation was accomplished. By the general amnesty and by special pardon of many in the excepted classes, a loyal population had been secured in all the Southern states. Conventions framed constitutions under the direction of the provisional governors, and also under immediate telegraphic supervision from Washington. The acts which the President demanded as conditions of his recognition were: the nullification of the ordinances of secession, the repudiation of the war debt, and the ratification of the thirteenth amendment by the first legislature. These measures were adopted with more or less grace — South Carolina, as usual, taking the lead in stubbornness. But in spite of occasional manifestations of ill-feeling, the alluring prospect of self-government and representa-

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tion in the national legislature kept the actions of the new governments in substantial accord with the President's wishes. The work of organization was completed, and by the opening of the thirty-ninth Congress in December, 1865, representatives and senators from most of the rebel states were ready to present their credentials for admission to that body. In his message, Mr. Johnson formally called upon Congress to complete the work of restoration, by receiving the Southerners, subject to the constitutional right of each House to judge of the elections, qualifications, and returns of its own members. A special message (December 18) announced specifically that the rebellion had been suppressed; that in all the insurrectionary states, except Florida and Texas, the people had reorganized their governments; and that in those two satisfactory progress was making. Upon the completion of the organization in these two states, then, the constitutional relations between commonwealths and national government were, as far as the executive was concerned, exactly as they had been before the war.

But the state of war which had been proclaimed in 1861 and 1862 by President Lincoln had not yet formally ceased to exist. By successive orders, the blockade, the prohibition of commercial intercourse, and the suspension of the *habeas corpus* were revoked by Mr. Johnson, but it was not till August 20, 1866, that the final proclamation went forth that the insurrection was ended, "and that peace, order, tranquillity, and civil authority now exist in and through the whole of the United States of America." Previous to that date, in all the states not declared at peace by special proclamations, the presumptive status of the inhabitants, under the unrevoked order of April 2, 1863, was that of public enemies. The only evidence of a different status was the fact of having taken the amnesty oath, or of having received a special pardon from the President. By the final order of Mr. Johnson, however, the liability of all civilians in the United States to the President's military authority ceased, and no effect of the war remained upon the private citizen in the Southern states, save that a rapidly diminishing number of unpardoned individuals were still responsible before the civil law for the crimes of treason and rebellion.

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Such was the condition of affairs that was claimed to have been brought about, by the fall of 1866, through executive action. As far as the judiciary was concerned, the restoration seemed to be fully accepted. The district courts of the United States resumed their work under the direction of the President as fast as the provisional organizations were effected. Chief Justice Chase declined to sit on the circuit bench while military authority was maintained in the circuit, on the ground that it was not becoming to the dignity of the highest judicial officers of the government to act under even the least shadow of subjection to armed force. He did not object, however, to the holding of the circuit courts by the district judge sitting alone.[1] As early as the December term of 1865, the Supreme Court ordered the cases on its docket from the Southern states to be called and disposed of.[2] Upon the proclamations by the President of the end of the insurrection, the regular sessions of all the courts were resumed. This action indicated a judicial belief that normal conditions had been restored in the Southern rebel states, at all events, were not reduced to the territorial status: for, by the [illegible] by Chief Justice Marshall in 1828, the jurisdiction of the constitutional courts of the United States did not extend to territories. In such regions it was for Congress to provide at will for the administration of justice.[3]

Great weight cannot be attached, however, to the attitude of the judiciary in this matter. Its duty was to follow the decisions of the political departments on questions of political status. But as regards the status of the Southern states, it soon became evident that no agreement of views now existed between the executive and the legislative. The President, as we have seen, had prepared to push his theory before Congress at its very opening. Credentials were promptly presented by members elect from the restored states. But the legislature declined to be hurried into committing itself to any doctrine on

[1] Letter to the President, Annual Cyclopedia for 1866, p. 514.
[2] 3 Wallace, viii.
[3] American Ins. Co. *vs.* Canter, 1 Peters, 546.

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the great subject. The House passed a resolution for the appointment of a joint committee of fifteen to inquire into the condition of the rebellious states, and their title to representation. The Senate agreed to the joint committee, and thus provided a convenient limbo to which might be relegated any question that should threaten to interfere with the placid progress of Congressional deliberation.

Reconstruction of Civil Rights.

There was a strong opposition to Mr. Johnson's theory among the Republicans in Congress, and at the same time a disinclination to an open rupture with the President. It was in obedience to this latter feeling that the Reconstruction committee was so heartily agreed to. Through this the main issue — the recognition of the Southern state governments — was deferred until it could be ascertained whether a substantial protection for the freedmen might not be obtained without coming to open hostility with the President. In accordance with this plan the aggressive spirit of the radicals was repressed, and the Judiciary committee, through its veteran leader, Trumbull, devised a series of measures of which the Freedmen's Bureau bill was the first to be presented.

By this bill[1] the bureau which had been organized during the preceding session[2] was enlarged both as to the duration and the territorial extent of its powers. The limit of one year after the end of the war was abolished, and the bureau's operations were to extend to "refugees and freedmen in all parts of the United States." The powers of the officials were of the vaguest character imaginable, involving practically absolute discretion in the regulation of matters in which the freedmen were interested. Provisions, clothing, fuel, *etc.*, were to be furnished to destitute blacks, land was to be set apart for their use, and schools and asylums to be erected for their benefit. But the central point of the bill was in the seventh and eighth sections. Here it was made the duty of the President to extend the mili-

[1] McPherson, Reconstruction, p. 72. [2] See *ante*, p. 564.

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tary protection of the bureau to all cases in which the civil rights and immunities of white persons were denied to others on account of race, color, or any previous condition of slavery or involuntary servitude. Further, any person who should, under color of any state law, ordinance, or custom, subject the negro to the deprivation of equal civil rights with the white man, should be guilty of a misdemeanor, and the jurisdiction of such cases was conferred upon the officials of the bureau. Such jurisdiction was limited, however, to states in which the ordinary course of judicial proceedings had been interrupted by rebellion, and was to cease there when those states should be fully restored to all their constitutional relations to the United States.

The grave questions of constitutionality involved in the details of this bill were modified in their bearing by the general basis on which the whole legislation rested. It was, according to Trumbull, a war measure, and inapplicable, by its terms, to any other state of affairs.[1] Under the "necessity" which the existing insurrection had made the supreme law of the land, the forcible displacement of a state's authority over matters of civil jurisdiction normally under its control, was fully justified.

But the President, in vetoing the bill under consideration, protested against "declaring to the American people and to the world, that the United States are still in a condition of civil war." He asserted that the rebellion was, in fact, at an end.[2] Mr. Johnson was in a rather difficult position here; for the *habeas corpus* was still suspended in the Southern states, and even while he was writing his veto message a military order had gone forth looking to the suppression of disloyal papers there.[3] It was reasonably asked upon what authority such executive acts could be performed if a state of peace prevailed.

The President's veto, made effective by the failure to override it in the Senate, strengthened the extremists in Congress; for many who desired the success of the conservative plan were indignant that it should be thwarted at the outset. A concur-

[1] *Globe*, 1st Session, XXXIX Congress, p. 320.
[2] McPherson, Reconstruction, p. 72. [3] *Ibid.*, p. 123.

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rent resolution was passed declaring that no member from any of the insurrectionary states should be admitted to either House till Congress should declare such state entitled to representation.[1] This was a formal declaration of war upon the executive policy. It notified the President that Congress intended to form its own judgment upon the status of the states, irrespective of any extraneous decision. It precipitated the conflict that had been impending since the amnesty proclamation of 1863, and which Lincoln's tact had been successful, and might afterwards have been successful, in avoiding. And finally, it indicated a strengthening of the feeling that some guaranty for the rights of the freedmen should be secured before the rights of the states should be conceded. A great silence and mystery hung about the committee whose report was to embody the views of Congress on the condition of the states. No one doubted that the enveloping clouds would continue until a satisfactory solution of the negro question should be discovered.

As the next step in the direction of such a solution, the Civil Rights bill was presented to the Senate by its Judiciary committee. The Freedman's Bureau bill had been confessedly in the nature of a temporary expedient. It had aimed to secure the protection of the blacks by military authority for a period that Congress should deem sufficient. By the second measure, however, the protection was to be incorporated permanently into the law of the land, and to be entrusted to the civil authorities of the nation. As the bill passed,[2] it provided first a broad foundation for rights in the declaration that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," are citizens of the United States. Equality of rights for all such citizens in respect to making and enforcing contracts, appearing in the courts, receiving, holding, and transferring property, and enjoying the benefit of all laws for the security of person and property, was then asserted. Section second made it a misdemeanor to subject any inhabitant of any state or territory to the deprivation of any right secured by the act, or to different punishment, by reason

[1] McPherson, Reconstruction, p. 72. [2] *Ibid.*, p. 78.

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of race, color, or previous condition of servitude, from that prescribed for white persons. The remainder of the bill was occupied with provisions in great detail for the enforcement of the first two sections. Cognizance of all cases arising under the act was given exclusively to United States courts, and the machinery for its strict execution was borrowed, with grim satisfaction, from the Fugitive Slave act.[1]

At the time the Civil Rights bill was proposed, it had become a well-grounded conviction that the Southern states would not yield to the negroes any appreciable share of the rights which Northern sentiment demanded for them. The legislatures of the reorganized governments, under cover of police regulations and vagrancy laws, had enacted severe discriminations against the freedmen in all the common civil rights.[2] In several states the tendency of these enactments toward a system of peonage had appeared so pronounced as to induce the military commanders to order that they be disregarded. Such proceedings strengthened the resolution, already well-defined, to remove the possibility of a system of modified slavery under state sanction. It was feared that Congressional action could never effect this purpose after the admission of the Southern representatives. The end must be achieved previous to the acknowledgment of the restoration, and acquiescence in the result could then be made a condition of the erring states' return.

At first glance, the provisions of the bill appeared out of all relation to our constitutional system. Never before had Congress been known to arrogate to itself the power to regulate the civil status of the inhabitants of a state. The proposition that United States courts should assume jurisdiction of disputes relating to property and contracts, and even of criminal actions down to common assault and battery, seemed like a sudden and complete revelation of that diabolical spirit of centralization, of which only the cloven hoof had been manifested heretofore. But the supporters of the bill showed a clear appreciation of the change that the great conflict had wrought. The consti-

[1] Trumbull; *Globe*, 1st Session, XXXIX Congress, p. 475.

[2] For summary of this legislation, see McPherson, Reconstruction, p. 28.

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tutional basis of the law was the thirteenth amendment. Slavery and involuntary servitude were by that article prohibited; and, by the second section, Congress, and not the state legislatures, was authorized to enforce the prohibition. What constituted slavery and involuntary servitude, in the sense of the amendment? Slavery and liberty are opposite terms. If slavery is prohibited, civil liberty must everywhere exist. But civil liberty consists in natural liberty, so far as restrained by human laws for the advantage of all, provided that these restraints be equal to all. A statute, then, which is not equal to all is an encroachment on the liberty of the deprived persons, and so a badge of servitude, such as is by the constitution prohibited. Thus the constitutionality of the bill was maintained. The essence of the plea was a wide construction of the terms "slavery" and "involuntary servitude." Broadly speaking, it was the practical application of what had heretofore been in the United States a mere theory, the idea of "equality" as an essential principle of "liberty." There was involved in this construction also a definite recognition of the national government as the protector of individuals against state oppression.

The far-reaching consequences of this view of the thirteenth amendment filled the friends of the old system with dismay. They insisted that the only effect of the new article was to destroy the relation of master and slave. Beyond this no action of the Federal authority was contemplated. The second clause gave no power to Congress that was not already conferred by the old constitution.[1] It was merely added to give the negro the privilege of *habeas corpus* in case the master persisted in holding him.[2] Upon the dissolution of the old bond the freedman became subject to the laws of his state, like any other inhabitant. The idea that the amendment carried with it an enormous centralization of power in the general government had never been heard of during the long discussion of the resolution in Congress. It was a recently devised scheme of the

[1] Art. 1, sec. 8, last clause.

[2] Cowan, of Pennsylvania; *Globe*, 1st Session, XXXIX Congress, p. 499.

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consolidationists to change the whole foundation of the government by interpretation. "Will anybody undertake to say," asked Cowan, "that that [amendment] was to prevent the involuntary servitude of my child to me, of my apprentice to me, or the *quasi*-servitude which the wife to some extent owes to her husband?" Nothing but African slavery was referred to, and only its various modifications were included in "involuntary servitude"; the broad question of civil liberty was not affected.

Whatever may have been the intention of the framers of the thirteenth amendment, the construction put upon it by Congress in the Civil Rights bill was promptly adopted by the judiciary. The bill was vetoed by the President on the same general line of reasoning that was employed with respect to the Freedmen's Bureau bill, but was immediately passed over the veto. Cases under its provisions came speedily before the circuit courts, where its constitutionality was questioned. Justice Swayne, in U. S. *vs.* Rhodes,[1] sustained the act, saying:

> The amendment reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits.

Chief Justice Chase also took a similar position, holding that Maryland's apprentice laws, discriminating between white and black apprentices, were in violation of the clause prohibiting involuntary servitude.[2] The later amendments, however, relieved the court of the heavy burden which hung upon it in basing equality in all civil rights upon the thirteenth alone. The construction of this amendment has been narrowed in later opinions, or rather, the tendency to widen it has been checked.[3]

In addition to the definition of "slavery" and "involuntary servitude," the Civil Rights bill undertook to fix the precise

[1] 1 Abbot's U. S. Reports, 56.

[2] Turner's case, 1 Abbot's U. S. Reports, 84.

[3] *Cf.* Blyew *vs.* U. S., 13 Wallace, 381; Slaughter House cases, 16 Wallace, 69; Civil Rights cases, 109 U. S. 3.

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meaning of the phrase "citizen of the United States." The matter had been involved, up to this time, in hopeless confusion. No positive legal definition had been authoritatively given. For general practical purposes, exact determination of the scope of citizenship had not been found necessary. Where any opinion at all had been pronounced, it had in most cases been in relation to the status of the free negroes. The weight of authority on this point was adverse to the claim of citizenship for the blacks.[1] During the war, however, the old view was entirely overthrown in practice. Mr. Lincoln's Attorney-General argued away all the precedents, and gave it as his official opinion that a free negro, born within the United States, was *ipso facto* a citizen thereof.[2] He assumed *nativity* as the broad basis of citizenship, and so universally recognized by public law. With that assumption the status of United States citizenship was placed entirely beyond the reach of any state influence whatever, and a purely national conception was attained. This view was the one incorporated into the Civil Rights bill. The declaration thus made by law was designed to end the uncertainty resulting from the varying authorities. Its abstract principle did not excite remonstrance so much as the deductions drawn from it in the remainder of the bill. For while the immediate effect of the definition was to make the freedmen citizens of the United States, the practical end of the other provisions of the bill was to make them also citizens of the several states in which they resided. This result was not stated in terms in the law, but was considered as a necessary corollary of the main proposition. The act gave to all citizens of the United States, in every state and territory, the same civil rights as were enjoyed by white citizens; or, practically, declared to the states that, however they might widen the scope of their citizenship, they should never contract it so as to embrace less than the whole number of citizens of the United States residing within their respective borders.

[1] So Attorney-General Wirt; 1 Opinions of Attorney-General, 507. *Cf.* Taney and Curtis in the Dred Scott case.

[2] McPherson, Rebellion, 378.

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To justify this sweeping enactment, the special conception of citizenship which the history of our institutions had developed was discarded, and the broad principle of public law was adopted in its place. All authorities agreed that the status of citizen implied the reciprocal duties of allegiance and protection.[1] A citizen of the United States, then, was entitled to the protection of that government to which allegiance was owed. But this protection was to operate against all sources of oppression, and if a state government happened to come in this category, it too must succumb.

Theories as to the Status of the States.

The intense opposition which the Civil Rights bill had excited permitted little hope that its provisions could remain permanently upon the statute book. Hence arose the movement to incorporate the principles of the bill in the constitution.

The struggle for the passage of the law had involved the widest discussion of all the questions connected with reconstruction. Mr. Johnson had not only separated from the Republican leaders, but had placed himself in a position that rendered reconciliation inconceivable. Under such circumstances, the conservative plan, which could only be successful through the President's support, had to be abandoned. Congress found itself obliged to formulate a theory of state status upon which it could rest for support in a decisive struggle with the executive. To the joint committee on reconstruction was entrusted the presentation of such a theory, and from this committee emanated the plan of reorganization which finally triumphed. Before considering the committee's report, however, it will be profitable to examine the various theories in respect to recon-

[1] *Cf.* Opinion of Attorney-General Bates; McPherson, Rebellion, p. 379. The employment of this relation as a basis from which to infer unlimited power to "protect," is discountenanced by the Supreme Court in U. S. *vs.* Cruikshank *et al.*, 92 U.S. 549: "In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other."

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struction which had become prominent since 1863. While varying infinitely in detail, these theories may be summarized, as to their fundamental principles, in five classes, which may be denominated: the Southern theory, the Presidential theory, the theory of forfeited rights, the theory of state suicide, and the conquered-province theory. Of these the first two were based on the idea of the indestructibility of a state in our system, the last two on the contradictory assumption, while the third was in the nature of a compromise on this question.

As preliminary to an examination of these theories it is necessary to determine as nearly as may be, what constituted the essence of the concept "state," under the *ante bellum* constitution. No attempt will be made, however, to discuss the question of sovereignty, or any other attribute held to exist outside of the organic law. "The word state," said Marshall, "is used in the constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."[1] What can be derived from the constitution itself as to the meaning of the term? Three distinct uses of the word may be found in the supreme law. First, it designates a mere territorial division with definite boundaries; second, it denotes the people, politically associated, who inhabit the same region; and third, it refers to the body politic within a defined region, involving the threefold notion of territory, people, and government. This last sense of the word is by far the most frequent in the constitution, and accordingly the Supreme Court has framed the definition of a state thus:

> A political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed.[2]

The theories to be examined may be viewed in the light afforded by this definition. The three essential elements of a state were held to be a geographical locality with determined

[1] Hepburn and Dundas *vs.* Ellzey, 2 Cranch, 226.

[2] Texas *vs.* White, 7 Wall. 721. *Cf.* Hunt, dissenting, in U. S. *vs.* Reese, 2 Otto, 250.

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limits, a community inhabiting it, and a government organized by that people. At the close of the war, two principal questions arose as to the insurrectionary districts: first, did states exist in those districts; and second, what was the relation of those states or districts to the government of the United States?

To the first of these questions the Southern theory, as has been stated, gave an affirmative answer. All the essentials of state-being remained unchanged by the war. Territory, people, and government conformed to the definition. The war had been waged by the North for the avowed purpose of suppressing an insurrection of individuals, and with no idea of interfering with the rights of the states. On individuals, then, all the consequences of the defeat must fall. But the states, it was admitted, were out of their constitutional relation to the general government. Their officers had taken no oath to support the constitution of the United States. No senators or representatives were acting for the states at Washington. The authority of the United States judiciary and of the revenue officials was not recognized by the state governments. But the result of the war had established the nullity of the acts upon which this severance of connection was based. The supposed separation was therefore unreal, and it became the duty of the officers to take the oath required by the constitution, of the legislature to provide for the despatch of congressmen to Washington, and of the people of the state to submit to the authority of the courts and officials of the Federal government. These steps having been taken, the Union would stand under the constitution as before the war.

It was upon this theory that the celebrated agreement between Sherman and Johnston was made after the surrender of Lee.[1] On the same principle, the rebel governors in most of the states convoked the legislatures to take action on the situation after the collapse of the Confederacy. It was the prevailing opinion throughout the South that the restoration would proceed on the lines of this theory.[2] But the repudiation of

[1] McPherson, Reconstruction, 121.

[2] Pollard, The Lost Cause Regained, p. 51.

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General Sherman's agreement by the administration, and the overthrow of the rebel state governments by the military commanders, dissipated the hopes of so simple an operation in readjustment, and finally disposed of any possible realization of the Southern idea.

The Presidential theory of state status has been pretty clearly indicated in the discussion of its practical application. Its cardinal doctrine was the indestructibility of a state, either by its own act or by act of the United States government. At no time, either during actual conflict, or when the Southern arms had been laid down, did the United States consist of less component states than before the first secession. To assert the contrary was to admit the dissolution of the Union. The territorial and popular conditions of the constitutional state remained unchanged in every case. As to the state government, however, a defect existed, brought about indirectly through the immediate relation of the people to the Federal government. All the officers, as well as the constituents of the rebel organizations, were insurgents, and hence incapable of political recognition by the United States authorities. With the removal of this disability, the *ante bellum* status returned. But until that removal, the vitality of the state was suspended through the incapacity of its organs to fulfil their functions. The President's pardon was the healing agent. Restored by it to normal relations with the general government, the people of the states became immediately invested with the *right* to establish their own will in organized form, and with the *right* to assume the former relation with the Union.

In these two theories, the Southern and the Presidential, the ultimate principle is obviously the resolution in favor of the states of all doubts arising out of the anomalous condition of affairs. Both alike relied for support upon the sentiment which the Republican platform of 1860 expressed in these words: "The maintenance inviolate of the rights of the states is essential to the balance of power on which the prosperity and endurance of our political fabric depend,"[1] and both alike adopted that

[1] Tribune Almanac for 1861, p. 30.

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view of the consequences of the war which corresponded to the statement of its object in the Crittenden resolution in Congress, in July, 1861, namely, "to defend and maintain the supremacy of the constitution, and to preserve the Union, with all the dignity, equality, and rights of the several states unimpaired."

Charles Sumner's famous theory of state suicide was the first of those which maintained that no state as known to the constitution existed on Southern soil at the close of the war. The enunciation of the theory was originally embodied in a series of resolutions offered in the Senate in 1862, but tabled.[1] The basis of the series is contained in the declaration that any act by which a state may undertake to put an end to the supremacy of the constitution within its territory is void, and, if sustained by force, such act is a practical abdication by the state of all rights under the constitution. Further, the treason involved in this resistance works instant forfeiture of the powers essential to the continued existence of the state as a body politic, and the state is, in the language of the law, *felo de se*. But the territory of the extinct commonwealth belongs irrevocably to the United States, and consequently becomes henceforth subject to the exclusive jurisdiction of Congress, like other territory of the nation. The immediate consequence of these principles, was, of course, the termination of all peculiar local institutions, based solely on the state authority. Slavery ceased to exist, and all the inhabitants of the territory, since they owed allegiance to the United States, must look to the national government for protection.

In Mr. Sumner's view, the three attributes involved in the definition mentioned above do not constitute the state known to the constitution. A fulfilment of the duties imposed by the fundamental law is indispensable to the conception. There can be no such an entity as a state out of practical relations with the United States. A state exists only by virtue of the maintenance of these relations. Certain obligations are imposed by the constitution upon the states, and certain privileges are accorded to them. Refusal to acknowledge the obligations

[1] McPherson, Rebellion, p. 322.

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works *ipso facto* a forfeiture of the privileges. Among the obligations is that fundamental one of recognizing the supremacy of the constitution and laws of the United States; among the privileges is the enjoyment of governmental rights not attributed to the Federal organization. Rejection of the former works forfeiture of the latter. But the immediate relation between the people and the general government is not at all affected. This government, therefore, becomes the sole authority for the regulation of their concerns. The inhabitants may organize themselves for admission as states, but Congress may impose its conditions upon them before granting their application. It can fix their boundaries at its pleasure and thus destroy every vestige of the former states. In short, where once existed sovereign states, only the territorial status survived the ordinance of secession.

The ultimate principle of this theory is that the United States is a nation, of which the constitution is the sovereign law. By the nation, through the constitution, certain powers are conferred upon people living in a given district. In these powers consists the essence of a "state." "A state under the American system," says an able advocate of the suicide doctrine, "is not in the domain and population fixed to it, nor yet in its exterior organization, but solely in the political powers, rights, and franchises which it holds from the United States, or as one of the United States."[1] It was by an act of free will on the part of the communities that they assumed these rights, and, by the permission of Congress, became states. A similar act of free will is sufficient to resign these rights, and to revert to that condition which preceded their assumption. "Nothing hinders a state from committing suicide if she chooses, any more than there was something which compelled the territory to become a state in the Union against its will." But however frequent may be the shuffling on and off of the state form, the United States, as territorial sovereign by virtue of natural laws far beyond the reach of local action, remains unaffected.

The conquered-province theory, which was held mainly by

[1] The American Republic, Brownson, p. 290.

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Thaddeus Stevens, coincided with that of Mr. Sumner in respect to the effect upon the states of their own acts. They became non-existent as states. But Stevens maintained that the course of the United States government had made it impossible to concede that they possessed, after their subjection, even the conditions of territories under the constitution. On Sumner's principle, the people of the South, upon submission to the national forces, became entitled to the rights of United States citizens, as guaranteed by the constitution and exercised previously to the erection of the state organization. They had been treated as belligerent enemies only so far as it was necessary in order to bring them under the power of the government as traitorous citizens. The government's right to treat them in either capacity had been affirmed by all departments, and acted upon by all. But Stevens regarded all the nice constructions of law by which this end was attained as forced and unreal. He appealed to the actual facts of the case, and asked if any one could look at the military rule controlling the South and say that it was not, in reality, the dominion of a conqueror. Neither during the war, nor at its close, had any constitutional limitation been regarded that stood in the way of making the Southern people subject to the absolute will of the United States government. Such had come to be their condition, and in no respect did it differ from that of a conquered foreign foe. By proclamation of the executive, by law of Congress, and by decision of the judiciary, the people of all the states in insurrection had been declared public enemies; as such they had been subdued by the armies of the nation; by their own act they had rejected the authority of the constitution, and it was not for them now to claim any rights under that instrument. Whatever might be the technical pleadings of the lawyers, the plain facts of the situation were that the lives, the liberty, and the property of all the South were, by virtue of conquest, at the absolute disposal of the government. The principles of international law might guide the settlement, if the government chose, but no provision of the domestic constitution had any binding force whatever.

From the theories of Sumner and Stevens, as well as from

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those of the Southerners and the President, conclusions were deduced which were very unpalatable to the majority of thinking men of the day. The possibility of arguing away the existence of a state was an idea quite as offensive as that of immediately conceding autonomy to the recreant commonwealths. On the one hand the historic conception of the nation as a Federal union seemed threatened with destruction; on the other hand, there appeared no guarantee of political results at all commensurate with the military triumph of the Unionists.

It was in consequence of this dilemma that the theory of forfeited rights was matured. Standing midway between the extreme doctrines, it embraced some feature of each of the rival theories, and like every compromise, it was deficient in a consistent relation of its parts. Its supporters would not concede that any state had been or could be out of the Union. But, while still integral parts of the nation, the insurgent communities were not in the enjoyment of all the rights which, in a normal condition, a state may enjoy. That element of the state which was designated the "people," should be in strictness called the political people. This political people had committed a political crime against the nation. But just as the individual who violates the civil law of society forfeits his civil rights in that society, so the community which offends against the political order of the nation may lose its political rights at the will of the sovereign. In no other way could the integrity of the nation be secure.

Now the agent of the sovereign, in adjudging the extent and duration of the punishment to be visited upon the recreant commonwealths, is Congress. This is evident from the very nature of government; but it is also immediately sanctioned by the constitution. For the United States is directed by that instrument to guarantee to every state a republican form of government. The nation thus becomes the final arbiter as to the status of a state. But Congress is empowered to make all laws necessary and proper to carry into effect the granted powers. Congress, therefore, and not the President, is to direct the rehabilitation of the states. Finally, the constitution, and laws made in pursuance thereof, shall be the supreme law of the

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land; under this clause the power of the legislature in the matter becomes indisputable. Neither the state nor the executive can claim any rights or authority as against the constitutional law-making organ of the government.

In many points the theory under discussion approaches very near to that of Sumner. It might be said, in general, that the only difference between them consists in a mere abstraction. Sumner held that the states did not exist; the forfeited-rights theory refrained from stating the idea in those terms, but held in fact that they should be considered, at the pleasure of Congress, in a condition of suspended animation. But on the hypothesis of state suicide, the very boundaries of the commonwealth might be obliterated, and its identity utterly destroyed; the rival theory drew the line here, and, while placing the vital principle of political rights at the mercy of Congress, made to conservative sentiment the cheap concession of territorial indestructibility.

The President's theory also appears often to follow quite closely the lines of the Congressional doctrine. Mr. Johnson himself had described the condition of the rebel states in respect to the exercise of their governmental rights, as that of suspended animation.[1] But the condition was not recognized as arising from the forfeiture of any of the rights they once possessed. Only in the retention of each and every one of such rights did he see the maintenance of the integrity of the states. The suspended animation was the consequence of a concrete state of affairs among the people of the state, and was not at all dependent upon the will of any political body outside of that community. Congress, in fine, the President held, had no power to deprive a state of any right as a penalty for the crimes of the people of the state. It was that power, however, which the national legislature, supported by the great mass of the Northern people, finally determined to exercise.

From the theories just outlined, and the multitude of views by which opinion shaded imperceptibly from one to the other of the definite doctrines, the Reconstruction committee was

[1] See his remarks to citizens of Indiana; McPherson, Reconstruction, p. 46.

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called upon to formulate a creed upon which the majority in Congress could stand united. Concession had to be made to all the various shades of opinion among Republicans. The report, therefore, embodied some feature of nearly all the theories, but the combination was such as to bring into clearest definition the doctrine of forfeited rights.[1]

In the first place, the committee adopted the view which the President had once proclaimed, that, at the close of the war, the people of the rebellious states were found "deprived of all civil government." The *de facto* governments set up during the rebellion were illegal as far as the United States government was concerned, and the attempt to legalize them by force had failed. At the cessation of hostilities, then, the Southern states were disorganized communities, and subject only to military dominion. The President, in his capacity as commander-in-chief of the army, however, had no authority to deal with the restoration of civil government. He appointed provisional governors, who were mere military officials and paid from the military appropriation. Through these officials the people of the disorganized communities adopted certain systems of government; but these were nothing more than phases of the President's military sway. There was nothing of a permanent nature in them, and their establishment had no effect as against any regulation that should be adopted by the law-making power in reference to the final adjustment of their relations.

> We cannot regard the various acts of the President in relation to the formation of local governments in the insurrectionary states . . . in any other light than as intimations to the people that as commander-in-chief of the army, he would consent to withdraw military rule, just in proportion as they should by their acts manifest a disposition to preserve order among themselves, establish governments denoting loyalty to the Union, and exhibit a settled determination to return to their allegiance; leaving with the law-making power to fix the terms of their final restoration to all their rights and privileges as states of the Union.

In meeting the conservative proposition that a state, under the constitution, must be either in the Union, with all rights abso-

[1] For the report, see McPherson, Reconstruction, p. 84.

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lutely recognized, or out of it, with no rights whatever, the committee's principle denied the completeness of the disjunction, and rested on the conception of a state with full rights, but with those rights in abeyance by virtue of circumstances demanding recognition by the supreme Federal government.

This view of the condition of the states was evidently that of the forfeited-rights theory. In deference to the conquered-province idea, however, the committee reminded the states that, "whether legally and constitutionally or not, they did, in fact, withdraw from the Union, and made themselves subject to another government of their own creation." The moral of this was that from one point of view "the conquered rebels are at the mercy of the conquerors." In such a situation, it was held to follow that the government had a right to exact indemnity for the injuries done, and to take security against the recurrence of such outrages. The concession to Stevens was thus utilized as a basis for the great maxim of the forfeited-rights school, "indemnity for the past and security for the future." Sumner's doctrine was also deferred to with much respect. The territorial basis of the nation was insisted upon, and it was denied that any portion of the people of the nation had the right, while remaining on its soil, to withdraw from or reject the authority of the United States. They might destroy their state governments, and "cease to exist in an organized form," but this in no way relieved them from their obligations under the constitution and the laws. The distinction was marked between the destruction of the states and the overthrow of the state governments. "The states," it was held, "may cease to exist in an organized form"; so far, but no farther, was the possibility of state destruction conceded. The constitution acts upon the people directly, and not upon the states as such; only by act of the people, therefore, may the states become amenable to the disciplinary power of the national government.

The conclusion of the committee, accordingly, was that the so-called Confederate states, having forfeited all civil and political privileges under the constitution, were not entitled to representation. Before allowing it, security for future peace and

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safety should be required. This could be obtained only by changes in the organic law with a view to determine the civil rights and privileges of citizens in all parts of the Republic, to place representation on an equitable basis, to fix a stigma upon treason, to protect loyal people against future claims for the losses sustained in support of rebellion and by the emancipation of slaves, and to grant express power to Congress to enforce these provisions.

There is manifest in the view thus set forth the same tendency to blend purely constitutional conceptions with the broader notions of international law that is seen in the theory of the war power employed during hostilities. It is only through this tendency that the exaction of indemnity becomes prominent. The general sentiment against the infliction of penalties for treason upon individuals, together with the conviction that punishment should be visited upon something, resulted in a transfer of the consequences of rebellion from the individual to the state. Any difficulties in the way of such a transfer were readily avoided by the resort to the practices of international warfare.

A month previous to the presentation of the committee's report, the measures necessary to the application of its principles had been submitted to Congress. The conditions which were regarded as necessary to be imposed upon the South were embodied in a proposition for a fourteenth amendment to the constitution. Accompanying the resolution were two bills to supplement it in carrying out the committee's plan. By one it was enacted that whenever any state lately in insurrection should ratify the proposed amendment to the constitution, and should modify its constitution and laws in conformity therewith, the congressmen from that state might be admitted into Congress as such. The companion bill declared ineligible to any office under the United States government all persons included in five specified classes, substantially the same as those exempted from amnesty by the President's early proclamation.[1]

In its general feature this plan announced by Congress re-

[1] For the bills, see McPherson, Reconstruction, p. 103.

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sembled that by which the President had effected restoration. A constitutional amendment was proposed, the adoption of which was the prime condition of recognition. But it was not deemed necessary to provide for governments through which state action should be taken. The Johnson organizations, while stigmatized as mere military concerns, were yet recognized as sufficiently representative in their character to express the will of the states. Such recognition was claimed to be a vital flaw in the consistency of the Congressional plan. If those governments were competent to ratify an amendment to the United States constitution, it was insisted that the states which organized them were entitled to representation in the United States Congress. The thirteenth amendment had become of effect through its adoption by the Johnson governments.[1] Much abuse was heaped upon Mr. Seward for his action in recognizing the right of the rebel states to vote on this matter,[2] but his method was found worthy of adoption.

The content of the amendment proposed to the states marks very accurately the progress that had been made in reconstruction by the spring of 1866. In the first section, the desire of the conservative Republicans to put the civil rights of the negroes under the protection of the United States is gratified. The fourth guarantees the financial integrity of the government, and thus satisfies those who feared some assertion of state rights that might legalize debts incurred in opposition to the national authority. These two provisions constitute the limitations upon the powers of the states that seemed unavoidable consequences of the war. The second and third sections of the amendment were less general in their scope. A very clumsy and artificial solution of the suffrage problem was embodied in the second. The alternative of enfranchising the blacks or losing proportionally in representation was a mere temporary compromise between two party factions. It was the most that friends of negro suffrage could secure at this stage of the process. But there was no indication that they would be satisfied

[1] See proclamation by Seward; McPherson, Reconstruction, p. 6.

[2] *E.g.*, Scofield, of Pa.; *Globe*, 2d Session, XXXIX Congress, p. 598.

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with this. The third section is mainly a manifestation of Congress's hostility to President Johnson. His very free exercise of the pardoning power interfered with the progress of the legislature's policy and no method of checking this interference seemed so feasible as a constitutional amendment. As a whole, the amendment is tentative. It betokens a yearning for a definite settlement of the two great questions of the day, tempered by dread of an adverse public sentiment.

The bills which accompanied the resolution containing the amendment were not acted upon during the first session of the thirty-ninth Congress, and the full inauguration of the committee's plan, therefore, was not accomplished. The first steps having been taken, it was considered well to await the action which the Southern states should take in the matter, and especially to ascertain the result of the fall elections, before making any further advances.

Only in the case of Tennessee was this policy departed from. In that state the Union party had in the previous year secured firm control of the government, and had adopted measures vigorously excluding their opponents from any share in its organization. The fourteenth amendment was promptly ratified by the legislature, though not without some doubts as to the regularity of the proceedings,[1] and Congress not less promptly declared Tennessee restored to the Union. In the preamble to the resolution restoring the state, the ground of the act was explained in accordance with the theory that Congress had adopted. The conditions considered necessary, it was stated, had been fulfilled, and, moreover, acts "proclaiming and denoting loyalty" had been performed by the new state government. These acts, not named in the law, were in fact the disfranchisement of all partisans of the Confederacy and various steps looking to negro suffrage.

It was to the attainment of these ends that a constantly growing sentiment had been directed from the beginning. Scruples as to the constitutionality of any interference by Congress with the hitherto sacred right of a state to regulate the

[1] American Cyclopedia, 1866, p. 729.

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qualifications for voting within its boundaries, had alone prevented the insertion of these acts among the conditions of restoration. The moderate Republicans desired that this regulation should be made by the voluntary act of the Johnson organizations. Till every hope of this consummation was exhausted, the forfeited-rights school of thinkers preferred to lean toward the conservative theories of state status. Two events converted this tendency into an unmistakable swerve toward the opposite extreme. These were, the unanimous rejection of the fourteenth amendment by the Southern legislatures, and the overwhelming defeat of the President in the fall Congressional elections.

Military Reconstruction.

An exhaustive discussion of the further progress of reconstruction in its relation to the constitution would involve an examination in more or less detail of the conflict between Congress and the other great departments of the government. Such examination, however, cannot be undertaken in this article. The fruitless impeachment of President Johnson was the climax of the legislature's struggle with the executive. As to the judiciary, a hostility to the radical tendency of Congress was unmistakably manifested in the cases of Milligan,[1] Cummings, and Garland.[2] The conservative attitude here assumed aroused a feeling of intense bitterness against the Supreme Court. Many laws were proposed looking to a curtailment of its appellate jurisdiction, and the suggestion was not wanting that even the original authority in certain cases secured to it by the constitution might be taken away by an amendment.[3] Whether the menaces directed against the judiciary had some effect, or whether adherence to the traditional policy of the court to avoid conflict on political questions with the legislature

[1] Thaddeus Stevens regarded this decision as scarcely less infamous than that in the Dred Scot case, and as much more dangerous to liberty. *Globe*, 2d Session, XXXIX Congress, p. 251.

[2] 4 Wallace.

[3] Bingham; *Globe*, 2d Session, XXXIX Congress, p. 502.

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was sufficient, it is certain that the will of Congress met with no adverse opinion during the remainder of the reconstruction era.

The further and final action of Congress, in bringing about the reorganization of the Southern commonwealths, is marked by a gradual but certain relinquishment in fact of the theory of state status which had been previously adopted and which was still adhered to in name. Each successive step rendered more and more obscure the connection with the forfeited-rights idea. Hitherto, by this theory, the will of the states, as expressed by the historical constituency of the states, had been recognized as entitled to at least the consideration involved in its assent to the conditions of restoration imposed by the national authority. Henceforth, the will of the nation is asserted without reference to that of the state. The process of military reconstruction, in its leading features, approaches very near to the theory of state suicide.

By the rejection of the fourteenth amendment, at the South, the process of restoration proposed in the committee's report was brought to a standstill. It was evident that the Southern whites would not consent to the admission of the blacks to the polls. In the North, the hot campaign in the fall elections had resulted very favorably to the friends of negro suffrage. Supported by a strong and growing public sentiment, the radicals now devoted their energies to the task of making the black vote the sole basis of reconstruction. This involved of necessity the subordination of the old political people of the various states to a new political people created by Congress. In this fact lay the practical triumph of the Sumner theory.

The law which finally inaugurated the work of military reconstruction was passed, over the President's veto, March 2, 1867. It declared that no legal state governments existed in ten states of the Union, and no adequate protection for life or property. The deficiency was made good by placing the said states under the military authority of the United States, and dividing them into five military districts with an officer of rank not less than brigadier-general at the head of each. The existing state governments were not abolished, but the sixth section of the bill

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enacted that any civil government which might exist in any of the states before its representatives were admitted to Congress should be deemed provisional only, and in all respects subject to the paramount authority of the United States. In the fifth section of the act were stated the conditions on which representatives would be admitted, and military government withdrawn. Here the triumph of the radicals was manifest; in addition to the ratification of the fourteenth amendment, it was required that a state constitution should have been framed by a convention chosen by all male citizens of the state of proper age, and "not disfranchised for participation in rebellion, or for felony," and that, in that constitution, the same qualifications for the electoral franchise should be ordained.

The theory of a voluntary acceptance of these terms by the states was still nominally adhered to; but no provision appeared in the act for the initiation of any movement for the fulfilment of the conditions. Such a movement could scarcely be expected of the existing governments, which had rejected the fourteenth amendment, and which were by the act declared illegal. This consideration is of itself sufficient to prove that the apparent deference to state action was an empty concession to the conservative element. But it was the last time such a concession was made.

On the 23d of March, 1867, the fortieth Congress, by the supplementary reconstruction act of that date, took into its own hands the whole process of reorganizing the recalcitrant districts. To the military commander of each district was assigned the duty of causing to be made a registration of voters qualified under the act of March 2, and of holding elections for delegates to a constitutional convention in each state. The work of the convention was to be submitted to the voters for ratification, all under the immediate control of the military commanders.

To overcome the ingenious constructions of the law which were adopted by the President to frustrate Congress's intentions, still another supplementary act was passed on the 19th of July. Mr. Johnson had begun the execution of the first two laws on the theory that the military authority was to be used

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only as auxiliary to the existing civil governments in the rebel states. The new act declared that those governments, if continued, were to be subject in all respects to the military commanders. Their officers could be removed at the will of the officer in command of the district. All supporters of the rebellion were disfranchised by a rigid test oath, which, however, was not to be conclusive of loyalty, since outside investigation was allowable. And finally, to thwart effectually the hostile influence of the administration, the General of the Army was invested with the final authority in the removal and suspension of officers, and no commander concerned in carrying out the acts was to be bound by any opinion of any civil officer of the United States. This last provision was aimed at the Attorney-General.

The three acts just outlined contain all the essential principles of the process by which reconstruction was actually accomplished. The chief features of the process were: first, the overthrow of the state governments organized by the lawful[1] voters of the ten states; second, the establishment of military government in the district included within their boundaries; and third, the determination by Congress of the qualifications of voters, not only for the immediate purpose of reorganization, but also for all the future existence of the commonwealths.

As to the first point, the action of Congress was entirely consistent with the ground it had taken at the beginning of its struggle with the President. It had steadily declined to recognize the organizations set up under Mr. Johnson's guidance as anything more than provisional. The status of a state that had forfeited its rights precluded the exercise of self-government until those rights had been restored. Under the radical tendency imparted to the legislature by the fall elections of 1866, Stevens succeeded in embodying his conquered-province theory in the preamble to the first military bill as it passed the House. The Senate, however, toned down the clause so as to avoid declaring the states extinct. In its final form, the act stigmatized them as "rebel states." Exactly what a "rebel state" is

[1] As determined by the President's proclamation. See p. 568.

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was not stated. By the radicals, the expression was regarded as conceding their claim that a state, as a corporate entity, could commit the insurrectionary act, and so draw upon itself the penalty of forfeiting its rights. The more moderate school, on the other hand, maintaining that rebellion was a crime of which only the individual could be guilty, construed the phrase as signifying a state whose inhabitants were wholly or chiefly rebels. But whether the state was extinct or merely without rights, the authority of the national government over its territory and people was equally indisputable. And of this national government, Congress was the responsible directing agency.

The second point in the process, that gave rise to great discussion in Congress, was the ground of justification for the imposition of purely military government on the rebel states. Assuming that the whole question was extra-constitutional, and that only the law of nations controlled Congress, there was no difficulty. Stevens and his followers had plain sailing. But if the rebel districts were still states, and their people citizens of the United States, how could the proclamation of martial law and the substitution of the military commission for the jury court be reconciled with the Bill of Rights? The most obvious answer was that the act practically declared the existence of one of those cases of rebellion or invasion in which the constitution authorizes Congress to suspend the ordinary safeguards of civil liberty. All admitted that the judgment of the legislature as to when such a case had arisen was final. But as a mere question of fact, at the time, the existence of rebellion or invasion was far from being clearly demonstrable. In spite of reports of outrages in various parts of the South, which partisan zeal magnified *ad libitum*, it could hardly be made to appear that the situation was such as even the freest construction of the constitution would cover.

The moderates were therefore compelled to fall back upon the assumption that the old war had not yet ended. For the benefit of this class, Lawrence of Ohio, though troubled with no scruples himself, resurrected an ancient Latin phrase, *bello non flagrante sed nondum cessante*, and pointed out that *bello*

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nondum cessante was recognized, in international law, as one phase of warfare. Such was the situation now in the Southern states.[1] "A rebellion," said Shellabarger, "is simply crushed by war, by the arms of the republic, but is still sufficiently strong to overthrow and defy the courts in nearly half the territories of the republic. That is a state of things contemplated by your constitution." The suspension of the *habeas corpus* was therefore strictly within the power of Congress, and would continue to be until state governments were recognized. The ground thus adopted puts the legislature on record in distinct contradiction to both the other departments. For by proclamations of April 2 and August 20, 1866, the President had announced that the insurrection once existing in the eleven specified states was at an end. His right to decide this, as a mere military fact, was never seriously questioned. Congress itself, though perhaps inadvertently, recognized the date of the proclamation as ending the war.[2] The Supreme Court, in its first opinion on the question,[3] expressly declined to discuss whether the rebellion could be considered as suppressed for one purpose and not for another. In the case before it, however, the date of the President's final proclamation was accepted. Later, Chief Justice Chase, on the ground that some act of a political department must be regarded as conclusive, decided, without reservation, that the executive must be followed.[4]

There is but one theory on which the setting up of military governments in the Southern states by Congress can be made to harmonize with the view of the other departments as to the termination of the rebellion, and that is, that the alleged inadequate protection for life or property in the rebel states in 1867 constituted a new "case of rebellion or invasion" which justified the establishment of martial law. But on this supposition there would be a direct collision between Congress and the

[1] *Globe;* 2d Session XXXIX Congress, p. 1083.

[2] Public Acts XXXIX Congress, 2d Session, chap. cxlv, sec. 2.

[3] U. S. *vs.* Anderson, 9 Wallace, 56.

[4] The Protector, 12 Wallace, 700. *Cf.* Brown *vs.* Hiatts, 15 Wallace, 184, and Balesville Inst. *vs.* Kauffman, 18 Wallace, 155.

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judiciary at another point. In the case of Milligan the court declared with unmistakable emphasis that "martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." Yet, in the states which were relegated by Congress to the unlimited dominion of officers "not below the rank of brigadier-general," the ordinary courts, both local and Federal, had transacted their regular business for nearly two years.

In reference to the third and perhaps most important principle of the military reconstruction acts, the legislature and the judiciary are in harmony, though the difficulty of reconciling their doctrine with the earlier interpretations of the constitution seems at times overwhelming. Congress enacted that new state governments should be organized by a political people differing *in toto* from that which had formerly been recognized as the basis of the commonwealths. The mass of the southern whites were excluded from any part in reconstruction; the freedmen were awarded the ballot, and were relied upon to accomplish the formation of state governments. Two questions arise in connection with these acts: first, by what authority did the national legislature direct the organization of new governments in the rebel states; second, under what authority did Congress prescribe the qualifications of electors for the operation? The answer to both questions is, in the guarantee clause of the constitution. Forfeited-rights, state-suicide, and conquered-province theories all agreed that Congress was the proper organ to provide for the re-establishment of state governments. By only the first, however, was an indefinite continuance of the existing condition of affairs considered anomalous. Sumner and Stevens saw no states existing in the south, and therefore felt no need of haste in the erection of states in territories. The less radical thinkers saw states without governments, and insisted upon the speediest termination of such a paradox.

It is declared by the constitution that "the United States shall guarantee to every state in this Union a republican form of government." The intention of the framers of the constitu-

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tion in this clause is precisely stated by Madison in *The Federalist*, number 43: "The authority extends no further than a guaranty of a republican form of government, which supposes a preexisting government of the form which is to be guaranteed."[1] A practical application of the clause had been demanded in connection with the Dorr rebellion in Rhode Island. The malcontents sought to secure interference by the general government on the ground that the limitation of the franchise under the old charter organization was unrepublican. President Tyler, however, wrote to Governor King, "It will be my duty to respect that government which has been recognized as the existing government of the state through all time past."[2] In other words, the word "guarantee" was understood to express a corrective and not a creative power. As Webster put it before the Supreme Court in 1848:

> The law and the constitution go on the idea that the states are all republican, that they are all representative in their forms, and that these popular governments in each state, the annually created creatures of the people, will give all proper facilities and necessary aids to bring about changes which the people may judge necessary in their constitutions.[3]

There can be no doubt that the construction of the guarantee clause embodied in these passages was the recognized principle of the law prior to 1867. Only by a complete rejection of the old interpretation could the moderates derive from the constitution the power of Congress to organize a government for a state. To maintain themselves in their somewhat unsteady position that a state could not perish, they wrenched the guarantee clause wholly away from its history. Nor was their violence successful. For to the impartial reader, the act of March 23, 1867, is much more suggestive of an enabling act for a territory than of a guaranteeing act for a state.

As the power to organize new governments in the rebel states was based upon an interpretation of the word "guarantee," so the right to determine the suffrage was evolved from the

[1] *Cf.* also Elliott's Debates, V, 128, 182, 333.
[2] *North American Review*, vol. 58, p. 398.
[3] Works, VI, 231.

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expression "a republican form of government." No authoritative definition of such a form exists in our law. The Supreme Court has ascribed the determination of its characteristics to Congress.[1] It was held by the negro-suffragists that the emancipation of the blacks and their admission to the enjoyment of civil rights had effected a modification in the conception of a "republican form." This doctrine was adopted by all the supporters of military reconstruction. "The new freemen," said Chief Justice Chase, in Texas *vs.* White, "necessarily became part of the people, and the people still constituted the state. . . . And it was the state, thus constituted, which was now entitled to the benefit of the constitutional guaranty." The implication was that a republican form under the new circumstances must include negroes among the bearers of the suffrage. It cannot be doubted that the decision of Congress as to when a state has a republican form of government is final. But a decision which runs counter to the facts of history as well as to the previous interpretation of our fundamental law may well be regarded as revolutionary. The principle of the reconstructionists was that impartial manhood suffrage, without respect to color, was a characteristic feature of a republican form of state government. In contradiction to this doctrine stood, first, the historical fact that at the formation of the constitution as well as at the era of reconstruction many if not most of the states excluded negroes from the polls; and second, the universally recognized legal principle that, by the plainest inference from article 1 section 2 of the constitution, the states were authorized to fix the qualifications of electors absolutely at their discretion. Sumner met both these obstacles boldly. He declared that the whole history of the negro in this country gave the lie to any claim that our state governments were or had been republican, and he argued with all the power of his learning, that color was in no sense a "qualification" of electors. The majority of the reconstructionists declined to follow him into such radical paths. They preferred to bridge the abyss that yawned between the old system and the new with a series of disjointed quibbles.

[1] Luther *vs.* Borden, 7 Howard, 42; Texas *vs.* White, 7 Wallace, 730.

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The doctrine of forfeited rights has been adopted, as a theory of constitutional law, by the Supreme Court,[1] and for a long time, probably, the legal relations of the Civil war and reconstruction will be construed in accordance with this theory. With its political bearings, however, the court has rightly disclaimed all connection. The question as presented to the judiciary was: Has such and such a state ever ceased to be a state of the Union? For answer to this interrogation, the court declared its obligation to follow the political departments of the government. A review of the acts of these departments failed to reveal an express declaration that any state had ceased to exist. The process of reconstruction presented many situations which could be explained as readily by assuming a revolution to have occurred as by strained constructions of the constitution. It was the duty of the judiciary, however, to preserve above all things the continuity of legal development. This duty was fulfilled, notably, in the elaborate argument, but very doubtful logic, of Texas *vs.* White. Private rights must be determined, then, on the theory that a state cannot perish. With political relations the case is different. Only the tension of a great national crisis is likely to call for a review of the reconstruction acts by the legislature; yet in such an emergency these precedents of political action may and probably will be regarded as much more consistent with the views of Sumner and Stevens than with the theory of forfeited rights. The growth of national sentiment is a potent reality, and it is not necessarily a diseased fancy that sees in the future a new South and a new North sternly banded together for the enforcement of the theory of state suicide upon a denationalizing West.

WM. A. DUNNING.

[1] Texas *vs.* White, 7 Wallace, 700; *cf.* also 1 Chase's Decisions, 139, and Gunn *vs.* Barry, 15 Wallace, 623.

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PROFITS UNDER MODERN CONDITIONS.

WE are drifting toward industrial war for lack of mental analysis. Classes in society are at variance over a ratio of division, and have no clear conception of the thing to be divided. If the profits of business constitute a limitless fund, they furnish a corresponding incentive to strife; and if this sum is virtual plunder, if it consists of wealth wrested by a social arrangement from the men whose labor creates it, the discontented class ought to include every member of society, and will include most members. It needs to be definitely known what profits are, and who earns them; and again how large they are, and who actually gets them. The nature of the prize of the social contest and the equities of the case need to be made far clearer than they have been.

Adam Smith's "profits of stock" included the general returns of the capitalist-employer. More recent writers have recognized that this person performs two functions, and receives a reward in each capacity. That which accrues to him as capitalist is interest; and that which comes to him as employer, or business manager, is known as *entrepreneur's* profit. This element is computed by deducting from his gross returns the interest on the capital that he uses.

What is not recognized in the prevalent theories is that the entrepreneur as such is a composite person. Besides furnishing some capital he still performs two unlike functions, and receives two distinct rewards. Of these rewards one is constant and the other intermittent; and it is this latter element that, as vaguely conceived, constitutes the incentive to social strife. It is the fact of confounding the two functions and merging the rewards attaching to them that has placed economic writers where it has been impossible either to make consistent theories or to comprehend the developments of modern business.

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An entrepreneur is, first, an industrial organizer; he directs the productive energies of other persons. If he be a manufacturer he divides and subdivides the labor of making a product, and assigns to each workman the part of the process to which he is adapted. The thing to be accomplished is prescribed; there is a certain article to be produced, and there is an accepted manner of producing it; and the routine function which first falls to the employer consists in directing the operation in its execution. He guards against wastes, impels workers to effective effort, and co-ordinates their labors. By his direction the work of many individuals is brought into organic unity. He is the brain of a little social organism; he does its executive planning, and communicates to the muscles the motive impulses that set them at work and control their action.

In this capacity the employer is the most important part of the *personnel* of the shop. He is a directive laborer. The outcome of his effort is a certain mechanical result, a transformation of matter. Directive labor, muscular labor and machines together create "form utilities"; they transform iron into implements, wool into cloth, *etc.;* and in these changes of form lies the value that they jointly bring into existence. Employer and workman are thus far laborers together; what they get for their efforts is, in the broad sense of the term, wages; and the employer's part is distinctively the *wage of directive labor.*

In addition to this there comes to an employer a return having a wholly different origin and nature; it is essentially mercantile. An employer buys, sells and gets gain like any dealer on the street. The business operations of a woolen manufacturer do not begin with wool in the sorting room, and end with goods in the storehouse. He must obtain the wool from dealers, and must hand the goods over to purchasers. The mechanical part of his business is completed at the mill, and by the working organism of which he is the head; the mercantile part extends into the world, and brings him into connection with other producing organisms. In this particular exchanging function the workmen have no part; the employer only is recognized in the market as the buyer of materials and the seller of goods.

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The buying of raw materials, however, does not end the employer's function as a purchaser; there is something more to be acquired if he is to become the valid owner of the product. Into the finished goods there enter other elements than raw materials, and these must be in part acquired by purchase. Within the mill itself there are titles to be transferred. Day by day, hour by hour, as the manufacturing goes on, new utilities come into existence. Every turn of the engine results in more cloth, more yarn, more carded wool, *etc.* The utilities thus created have definite values; unfinished goods may not be immediately salable, but the employer would know how to rate them were he to take an account of stock. Every step in the process that brings them nearer to the condition in which they can be placed upon the market adds something to the value of the crude materials with which the process began. These increments of utility are, as we have said, jointly created by three agencies: directive labor, muscular labor and machines. This determines their ownership: they belong, in undivided shares, to the director, the workmen and the furnisher of machines, or the capitalist.

Now the essential fact is that the employer buys out his partners in the productive operation. He pays for the share of the workmen in wages and for that of the capitalist in interest, and acquires thereby a title to the utilities created in the mill. As the raw material is his from the outset, he ends by becoming the owner of every element of the product. In his own name he may place the goods on the market and get what he can for them.

The function of the entrepreneur as such consists therefore in two operations, the one mechanical and the other mercantile: he directs a productive process, and he buys the elements that enter into the product and sells them collectively in the product itself. In the one capacity he is a laborer and receives a higher variety of wages; in the other capacity he is a merchant, and receives a margin of difference between what he pays and what he gets. The finished goods are supposed to

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bring in the market more than the cost of all the elements that compose them.[1]

In a complete study of profits it needs to be noticed that the mercantile part of the employer's function requires both labor and capital. He must spend time in obtaining materials, in making contracts with workmen and capitalists, and in disposing of goods. Here there is a need of labor; and there is a necessity for capital of the circulating kind in the holding of goods until they can be sold and paid for. Mercantile labor as well as mechanical is entitled to wages, and circulating capital as well as fixed is entitled to interest. A mercantile wage constitutes the second part of the general wage of business management; and an item of interest on circulating capital constitutes a part of the general claim of capital.

The labor involved in buying and selling is only incidental to the mercantile function. It is not the essence of it; that lies in the mere acquiring and surrendering of ownership. It is because the elements that enter into a product come successively into an employer's possession, and then pass collectively out of it, that he can look for a return over and above the wages of every kind of labor and the interest of every kind of capital involved in the business operation. We must group in one item all that comes to an employer in compensation for effort of any kind, and in another all that goes to compensate the capitalist.

The general wage of business management constitutes one of the preferred claims on the returns of business; it must be deducted from them before final profits can be computed. Ordinary wages constitute another preferred claim, interest a third and the cost of materials a fourth. If, to avoid intricacy, we group taxes, all forms of insurance and incidental expenses as a fifth claim the sum of these five amounts will represent the total cost of acquiring the title to a product. In selling the product for more than this sum total lies the employer's chance of ultimate gain. Pure profit is the return of simple ownership. It is free from all admixture of wages and of interest. It accrues

[1] This analysis of gross profits was published in *Work and Wages* for March, 1887, in an article by the writer of the present paper.

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to him who simply extends the ægis of his civil rights over the elements of a product, and then withdraws it in order that the product may pass into other hands. The *entrepreneur* or *assumer* is he who takes upon himself the responsibility of ownership.

That the capitalist, the manager, and the owner of the product may at times be one and the same person does not affect the analysis; the three functions are distinct, and the rewards attaching to them are equally so. The growth of corporations tends in a practical way to separate these functions. Capitalists are here a body of stockholders, bondholders and business creditors; managers are a body of salaried officials; while entrepreneurs, in the limited sense of the term, are the stockholders. Pure profit resides in the portion of the dividends that is in excess of current interest on the paid-up capital.

Pure profit is the prize that lures men into business ventures. On this element in the returns of industry are centered the larger expectations of working men. There is no other element from which they can draw a considerable dividend by a change in distribution. Though interest were reduced by a half, and managers' salaries curtailed in the same proportion, the sum thus saved would, as divided among workmen, raise wages only by a small fraction. The elastic margin of pure mercantile profit appears to the undiscerning to be a more promising source of gain. It is important to know how large, under modern conditions, this sum is becoming.

The elements in the cost of a product are primarily determined by conditions over which the employer has no control. Wages are fixed in the general market for labor; there is not one rate for a particular manufacturer and another for his rival in the trade, nor are there considerable differences between the rates prevailing in most of the different trades. Labor passes freely from one establishment to another, and even from one industrial group to another, and the permanent tendency of wages is toward uniformity. This large element in the cost of products is fixed by uncontrollable movements in a universal market.

Interest is determined by equally general conditions, and is

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uniform to all borrowers who furnish equal guaranties for the certainty and promptness of their payments. The cost of raw materials is determined in a market that is somewhat more limited; it is gauged by the transactions that take place between the industrial group that produces it and the several groups that use it. This market is broad enough to be beyond individual control.

The cost of the labor of management is subject to more disturbing influences than almost any other economic element; and general statements concerning this item of outlay need to be made with adequate reservations. Personal relations may make a particular salary abnormal. The principle that tends to determine the wage of business management may be formulated and, with due caution, applied; it is fixed in a general market for labor of a given intellectual and moral quality. Tried ability and integrity demand high rates of pay, but gravitate toward any honorable occupation that offers them; and the general tendency here as elsewhere is toward a certain uniformity. Rates of insurance and taxation are governed by impartial rules. The elements that constitute the cost of a product to the man who is to own and sell it are fixed by conditions which he cannot change.

His returns are equally beyond his control. The price of his product is adjusted in the open market by transactions between the group to which he belongs and the various groups that contain his customers. The adjustment is similar to that which governs the price of raw materials. Pure profit is the difference between this uncontrollable amount and the sum of the equally uncontrollable amounts disbursed. The reward of the entrepreneur in his capacity as owner of a product comes to him, as rain from the clouds, through the action of forces lying beyond the range of his dominant influence. He has nothing to do but to receive it. He must accept what comes into his treasury, and submit to what goes out of it; the difference, which is pure profit or loss, is fixed without appeal.[1]

[1] Gains effected by the illegitimate manipulation of values, such as is sometimes practiced in Wall Street and elsewhere, do not fall within the scope of this discussion.

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In his other capacity, that of manager, the entrepreneur is not the helpless creature of fate. His fortune is largely in his own hands. Moreover the fortune of the owner is, in a negative way, entrusted to the manager, who can always mar it, though he cannot always make it. In a study of profits it needs to be assumed that the shop is running under competent direction; otherwise, under modern conditions, it will quickly pass from the industrial field. Materials must be well selected, the working force well handled, and the goods rapidly and safely marketed, or the pure profit will become a negative quantity, and the business will be terminated. There are transient conditions in which mediocrity may for some time hold its place; but the sword is over its head from the outset, and will fall in due time.

The modern struggle for existence means the survival of the fittest type of industrial establishment. Elements that determine the question of fitness are location, working method and managing efficiency. The shop that is unfavorably located yields its business to others; and industries tend automatically to concentrate in places where they can thrive. The mill that uses an antiquated process must change it or stop working; and industries tend towards uniform mechanical excellence. The establishment that is badly conducted must change its management or fail; and business tends to concentrate in the hands of those who conduct it with the greatest energy and wisdom.

The centralization of industry gives a special impulse to the tendency to eliminate mediocre management; it permits a division of the directive function. There are diversities of gifts in the business world; the good mechanic may be a bad financier, salesman, *etc.* The great establishment places in every responsible position a man specially adapted to it. The entrepreneur of a highly developed establishment is a collective personality. The shop that is under individual direction is no longer typical; and if we continue to speak in the singular number of the manager, the owner, and the capitalist, it is to keep in mind the essential unity of the several groups that the terms must really designate. In clear cut distinctness of function, it is as though

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they were individuals; in efficiency, they greatly surpass them, and tend to supplant them in the industrial field. Modern business demands and secures an aggregation of forces in every department. Groups that have supplanted individual managers continue the competition among themselves, and the entrepreneur that tends to ultimately survive is a body of men, each one of whom has shown special capacity in his department. The typical modern manager is an organization that is perfect in each separate part.

In formulating the principle that gauges the returns of a particular manager at a given time, the analogies between rent and profit are instructive. They have been well utilized by one of the most eminent of living economists, General Francis A. Walker. Having now in view a different end, that of establishing a law of development, and of determining the rate toward which the different elements in general profits are tending, I find it possible to derive complementary lessons from the contrasts presented by the Ricardian principle of rent and the principle that asserts itself in the management of modern business.

The area of cultivation in agriculture is governed by a law of extension; the range of managing ability is subject to a principle of elimination and contraction. According to accepted formulas the best land is first used, and cultivation then extends to poorer and poorer qualities. The process begins with one grade and ends with many. In general business, various degrees of managing ability come early into the field; competition eliminates one after another, till the best only is sure of permanent survival. With one qualification, hereafter to be stated, the process begins with many grades and ends, if it is ever completed, with one. The difference in productiveness between the best land and the worst is increasing; that between the best management and the worst that we need to take account of is diminishing. The rent of lands varies as their qualities, from nothing to an increasingly large sum; the wages of managers tend, like their business qualities, in the direction of uniformity.

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Agriculture is dominated by a law of diminishing returns; and general business by a law of increasing returns. Double the labor and capital expended on an acre of ground and you do not double the crop; double the labor and capital entrusted to an efficient manager and you more than double the product. The concentration of labor and capital renders more costly the products of agriculture; and the same influence cheapens those of general business.

It follows that the demand for agricultural products tends to outrun the supply; while the supply of manufactured commodities tends to outrun the demand. In the one case increasing population is the primary fact; and this calls for more food, *etc.*, in spite of the greater cost at which it is obtained. In the other case cheapened production is the primary fact; and this influence thrusts an increasing product upon the market, notwithstanding the diminished price at which it must be sold. The output of great manufacturing industries is disposed of by a process that tends continually to take on somewhat of the character of a forced sale. The normal condition of many industries is one that, from a business man's point of view, must be termed overproduction; it is the condition in which more is produced at each particular interval than can be sold at prices that through the preceding interval prevailed. It is this final test of oversupply that weak producers cannot endure.

The struggle for existence is pending, and industrial groups show various degrees of approach to the consummation to which it leads. In some groups the surviving establishments are already in a state of high and nearly uniform efficiency; while in others they still differ considerably in this respect. There is, moreover, scattered over the industrial field, an experimenting class, whose presence renders necessary the qualification in the statement of general laws to which reference has already been made. These men are testing their capacity to survive in the contest with men of tried ability. A few win permanent places; the remainder pass from the field; but their transient presence disguises the operation of the law of survival. They must be left out of account if we are to know how far the devel-

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opment has proceeded, and what grade of managing efficiency has a chance of permanent continuance. Any group may have its experimenters who are of greatly inferior quality. The old employer who is about to be crowded from the field marks the margin of survival; better managers may remain in the field, while worse ones will be cast out.

The merging of the functions of owner and manager introduces another element of variation, and makes farther care necessary in practically testing the theoretical rule. A man who, besides pure profit, receives a salary and perhaps an element of interest may not take leave of the competitive field when, according to simple theory, he ought to do so. After profits and interest have vanished he may live on a salary, and may struggle against fate till his capital is curtailed. Through all variations in its application, the law of survival holds true, and places in control of the material fortunes of humanity a class of managing agents who are diminishing in number and improving in quality. They are in fact agents and not principals; it is the interests of others that are primarily entrusted to their keeping; for though their wages become relatively high, they are kept within sharp limitations, while the largest fruit of their invaluable labor passes by an irresistible law to society.

Wages of management are radically affected by the division of directive labor. The typical modern manager, as already noticed, is a collective personality. Were the rare qualities that are needed for conducting a great enterprise combined in one man he could command a monopoly wage. It would be impossible to replace him, in case he were to leave his employment; and the limit of his salary would be set only by the paying ability of the capitalist-owner. It is possible to replace any member of a managing organization, and the salaries of the members cannot well be excessive. There is a graded list of candidates for the different positions. Counting rooms are full of potential presidents, secretaries and treasurers; shops are full of potential superintendents; and though some of the candidates may be, by a certain margin of difference, inferior to

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the men now occupying the higher places, the fact of their presence places a definite check on the salaries that are paid. Experience in work of the higher sort would reduce the difference in quality between the men in the better positions and the candidates for them. The tried man has the preference; but his tenure of office depends in a measure on his success in what may be termed a continuous competitive examination. There are complications arising from the fact that personal relations to capitalists are not without a large influence on the awarding of the prizes in this contest; but available candidates are always numerous enough to place a definite limit beyond which the wages of directive labor may not rise. This element of an employer's returns is determined by active competition in a general market for labor of a certain intrinsic quality.

There remains to be determined the amount of pure mercantile profit. This is the final element in the analysis of the gross returns of business, and if there are principles governing it, then the division of social wealth is at least a scientific process. Pure profit is the seemingly uncertain quantity which lures men into business, and which figures in the minds of the discontented as the prize of agitation. Here, if anywhere, lies the spring that fills the pools of unearned wealth.

Pure profit is a vanishing sum. The *a priori* laws of political economy demand the annihilation of it, and it submits to the decree. In the Ricardian sense of the term the natural amount of this ultimate profit is *nil*. It is a positive quantity where the competitive law has not fully asserted itself, and where, within the sphere of its control, it is checked by temporary influences. Economic orthodoxy concedes to this element no theoretical existence; and where the assumptions of this system concerning competition are realized, the practice of the world becomes orthodox; pure profit actually disappears. This is an unanticipated vindication of logic. Ricardo did not predict such an outcome, nor did he so far analyze the returns of industry as to distinguish the element that is subject to the law of annihilation. Yet his system involved the principle, and the conformity to it of actual practice is the latter-day triumph of Ricardianism.

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With capital seeking investment at the prevalent rate of interest, with directive labor seeking employment at the high rate of wages that its quality demands, can they fail to find each other out, if by union they can each secure a premium? Can anything prevent them from simultaneously migrating to the point where, besides their wages and interest, they can command an ulterior gain? Nothing can do so in theory. Ordinary risk is not a barrier, since that is counterbalanced by the item of insurance which in our analysis we have recognized. Economic formulas call for a prompt migration of labor and capital to the point of special inducement; and the formulas are justified. A subject of common remark is the reckless promptness with which the movement actually takes place. An employer who is getting more than interest and wages of direction is interested to enlarge his product by drawing on the loan fund of the market; and a capitalist who by engaging in industry can secure more than interest and wages of direction, is interested to create a new establishment by drawing on the market for directive labor. By enlargements from within and accessions from without the productive plant is enlarged, the product increased and the price of it reduced to the point at which capital and labor of every kind receive only their normal reward. The point of stable equilibrium is that at which a capitalist-employer realizes neither more nor less than interest on his capital and a salary for his time.

Stable equilibrium is not usually rest. Influences may disturb the adjustment, and in this instance they do so as regularly as it is effected. It is not to be anticipated that the myriad of different industries that occupy the economic field will ever simultaneously reach their natural level of productiveness. Pure profits will always be found at numerous points, though at no one of them will they prove permanent. If we continue to watch a particular industry we shall see pure profit appearing, as the result of a disturbing influence, and then slowly vanishing, as competition reasserts its control. If we watch the entire industrial field we shall see pure profit appearing, now here and now there, shifting forever its place in the field, but never absent from it.

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One influence which periodically raises the returns of business above their natural limit is the rhythmical movement of trade, or the fluctuation from under-consumption to over-consumption that results from internal changes in the economic system. The period of active demand yields profits where, other conditions remaining the same, that of slackened demand entails losses. The two results should be made to offset each other by averaging the returns of a considerable number of years, if the true status of an industry is to be ascertained. When, in a long interval, the pure profits just balance the losses the natural rate of returns may be considered as maintained.

The settlement of a fertile continent is a disturbing influence that may extend through a hundred years, and this period must then be regarded as a prolonged interval of adjustment. Competitive law cannot fully vindicate itself while soil exploitation — not agriculture — is pouring treasures into every one's lap. Yet in the end the slow moving law will assert its power. The opening of America to settlement created an originally high level of general profits, from which level competition has reduced them with varying rates of rapidity. Some localities and some industries still realize abnormal gains from this source.

There is another disturbing influence which gives a promise of constantly recurring as long as the economic system continues. It acts intermittently, and on particular industries, but is always present at a thousand different points in the general field. It is the legitimate creator of pure mercantile profit; and though we call its action a disturbance, since it counteracts the action of competitive law, yet this influence is as natural as the force that it abrogates. It affords a guaranty for continued civilization. It is the result of a unique human service, that is the most far-reaching in its effects of any that an industrial worker can render. This is the making and applying of inventions. While the rest of humanity are working, an elect few are searching. The results of their search come partially and temporarily to themselves; the major rewards diffuse themselves among the members of society as a whole, who in the end absorb the total gain. The natural rewards of invention

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are the most economical and effective of all possible modes of ensuring the advance of material civilization. They come in a form adapted to secure a maximum result with a minimum of expense to the beneficiaries. They are not stipends, but prizes; and their effect is to enlist the services of scores of men where only one can receive a personal return.

Invention may give to an establishment a temporary monopoly of a new process or a new product, and raise profit for the time being above the natural level. The making of such discoveries is not a part of the routine work of a manager. It does not fall within the scope of any function for which a salary is paid. Some Yankee ingenuity, some power of adapting mechanical means to ends is indeed required in a successful superintendent. The exercise of it in minor ways lies within the routine of his business. But the inventions that we are now considering are those that materially change that routine. If a salaried manager makes such an invention, it is extra-official work, and entitles him to the same reward that would accrue to any other inventor.

The relations between the makers of inventions and those who introduce them are an interesting subject of study; and so are the effects which the introduction of them has on establishments that continue to use the older methods. It is not, however, desirable to obscure our main propositions by too many corollaries. The device that effects an important economy must, in the end, force itself into general use, and thus end the advantage which prior possession gives to its originators. Patents expire, and secrets become known. The public gets a part of the benefit from the first introduction of an economical process, and gets the whole benefit in the end. Competition restores the natural rate of profit, and leaves, as a permanent result, an increase of productive power, an elevation of the level of human life. Patent laws are an evidence that the personal rewards to be gained by this service are too small, rather than too large, and that it is the aim of the state to prolong the fruits of invention beyond the limit of time during which, by natural law, the inventor could enjoy them.

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If the theory here advanced is true, an inquiry into the business profits realized in this country during the past few years should show that some industries are, and others are not, approaching the condition in which only natural profits are afforded. Statistics that group several branches of manufacturing and state returns in the aggregate may be expected to show a profit somewhat above the natural rate; and figures for the country at large must certainly do so. The general rate of profit in the United States is high, not only because of gains realized by many inventions, but because of returns still realized by the quick exploitation of natural resources. Statistics taken a few years hence would probably eliminate much of this latter variation. The profits from invention would remain, and the returns of any considerable group of industries must be expected to show a permanent average profit somewhat above the natural limit.

On the other hand, the returns of particular branches of industry would show, in many cases, a close approximation to the limit. Figures taken in a single case would show the stage of development that one industry has reached; they would show whether it is still enjoying a residuum of originally high profit, or whether the competitive pressure has reduced its gains to the rate that can be permanently maintained.

It will be seen that the facts that we need in order to fully verify our theory are not at present to be had. Fortunately, however, the facts that are most useful are those that relate, in each case, to one specific department of business; and here the knowledge which each employer in that department possesses is of more than ordinary scientific value. For many purposes aggregates and averages taken from many branches of production are necessary; and these the business man cannot furnish. For our present purpose averages are misleading, and the returns of different departments taken each by itself, give the testimony that we desire. It is not difficult to obtain facts of this kind which strikingly illustrate the tendency of recent influences to crowd profits to a point that affords nothing beyond interest and the wages of management.

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The returns of the textile industries of New England, as shown in the report of the Boston stock market, reveal the fact that a few members of this extensive group have, during the fifteen years preceding 1886, enjoyed a certain immunity from the full effects of competitive law. The returns of the group as a whole have, during that interval, been strikingly near to the point of natural profit. The same appears to be true of the shoe and leather industries. The iron and steel manufactures and the numerous branches affiliated with them compose a group so extensive that its average profits would be unavailable for our purpose. Though such gains as those which patents secured to the screw-making industry may now be rare, there are departments enough in which competition is held in temporary abeyance to cause considerable deviation from the theoretical standard. Yet within this general group may be found numerous cases in which the law is verified; and the same is true in other parts of the manufacturing field.

Public transportation is a department of production essentially peculiar. The local traffic of railroads enjoys a certain immunity from the full effects of competition. This source of variation from theoretical standards is apparently counterbalanced by influences of an opposite character, and the railroads of the United States show an approximation to the normal rate of profits that is even closer than that of the textile industries. More and better statistics than are now available are certain soon to be collected; and there is no risk in affirming that where the prescribed conditions exist, the normal rate of profits will be realized. Labor of every sort will be paid for; capital will be rewarded; but there will be no bonus for any one.[1]

We are living in a half-developed system, and in the law of its growth may discern more clearly than was formerly possible an outline of the form that it will ultimately take. That law connects the rewards of business life with services, and gauges them in amount by the value of those services. It gives more

[1] I am indebted to the Hon. Joseph H. Walker, of Worcester, Mass., for statistics tending to show that, in manufacturing industries, profits in excess of the natural rate, when they are not secured by inventions, have of late been rapidly disappearing.

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to intellect than to muscle, and more to character than to either; the largest stipends that it offers are for fidelity to trusts. It checks undue discrimination in favor of mere position, and ensures to the men in the industrial ranks rates of pay not too far below those enjoyed by their leaders. It offers special prizes for the discovery of secrets of effective work. It limits more closely than statute law could do the personal benefits that accrue to the men who render this service, so that when the law is invoked it is for the purpose of increasing them. By organization and discovery it constantly places humanity upon new vantage ground in the struggle for well-being. Less and less, measured in effort, is becoming the cost of a day's enjoyments; greater and greater, measured in enjoyments, are the returns of a day's labor. In cheapened production, which is never appreciated, and is often blindly resisted, lies, according to this social law, the chief hope for modern workers. The leaders and discoverers whose labor ensures this constant gain find their rewards limited in amount and in time, while the wealth that they diffuse throughout society is, in both directions, limitless. The outline of the coming industrial state has the shape neither of despotism nor of democracy; it is the outline of a true republic.

JOHN B. CLARK.

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THE NATURAL RATE OF WAGES.

IN his chapter on "Popular Remedies for Low Wages" John Stuart Mill described a certain "considerable body of existing opinion on the subject." The opinion here referred to was not critical opinion merely, it was also opinion as an active force. Taking form in legislation, or, less coercively, in moral influence, it undertook to provide that the workman should have "reasonable" or "sufficient" wages. That is, it was exerted to maintain wages "above the point to which they would be brought by competition."

As in Mr. Mill's time, so now, there are two sets of forces operating with reference to the rate of wages. One set is composed of the forces of competition. Their action is automatic. Their resultant is a mechanical equilibrium. The other forces are self-conscious forms of human feeling and opinion. They set up a standard of justice, and take form in moral judgments, appeals to reason, the policy of labor organizations, legislation, and administration. Whatever their efficacy for good or ill, the self-conscious forces are acquiring an increasing prominence.

In regard to these two kinds of forces that make, or are supposed to make, the rate of wages, we may discover three different views among economic thinkers.

By economists of severely deductive habits and somewhat reactionary tendencies, the self-conscious forces are dismissed as of no importance except as a disturbing element. They are regarded as impotent to affect the rate of wages in the long run. Competition is held to be the only agency that needs to be considered, because, sooner or later, the rate of wages will be made inexorably, in the outworking of an automatic natural process.

Another class of thinkers, if we may call them such, deniers of natural law in the social world, reach the opposite conclusion. Competition they regard as a kind of human conduct that can be checked and presently made end of, like crime or intemper-

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ance. The self-conscious social efforts are believed to be quite sufficient, if fully put forth, to make the rate of wages, so far as the making is an affair of distributing a certain total product among the parties engaged in its production.

According to a third and middle view, the self-conscious forces sustain some relation to the physical and automatic forces by way of limitation and supplement. Just what this relation is, is a fact for scientific investigation to determine.

In science, as in practical affairs, the mean hypothesis is often more promising than either extreme, and it certainly is so in the highly complex sciences of social phenomena. Assuming then, provisionally, that the rate of wages is the resultant of competitive and moral forces acting simultaneously, the true wages problem, as it presents itself to the economist to-day, is to resolve this resultant, and ascertain whether it lies mainly within the projection of the competitive, or mainly within the projection of the moral forces.

I.

We may conveniently begin the study of this problem by examining the standards of ideal, or just, wages, that are set up, and attempting to decide what, if any, is their common and valid content. We may then study the competitive process as it goes on in the absence of consciously imposed restrictions and ascertain how nearly the results approximate to the ideal. Lastly, we may inquire whether the application of the self-conscious forces serves, or can serve, to make the approximation more complete.

We are so accustomed to make a sharp distinction between the communistic and the individualistic ideals of society that it may seem absurd to affirm that, within rather broad limits, there is no absolute contradiction between the communistic rule: "From each according to his abilities, to each according to his needs," and the individualistic rule: "To each according to the value of his work." But if we go back to organic principles we shall soon discover that, as a general and average fact, the one

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rule cannot mean anything else than the other, and that, so far as the two do not coincide they correct each other. Taking the phenomena of life as a whole, there is, and must be, an equivalence between needs and work, and an equivalence between the satisfaction of needs and the existence of abilities to work. Needs are, in general, but the requirements of certain things to replace the tissue consumed in physical and mental efforts, or to build up and develop tissue for greater future efforts. These efforts, adjusted to useful ends, are work, and apart from work, therefore, there are no genuine needs. Excepting the needs of childhood, old age and misfortune — exceptions more nominal than real — desires or requirements for other ends than those of useful service for self or others are pseudo-needs, illegitimate in economy as in ethics. The satisfaction of needs is not limited, however, to the mere restitution of an exact equivalent of human energy already expended. To some extent it anticipates work to be done. Nature makes generous advances to her children, but inexorably enforces payment.[1] A given amount of food contains more energy, usually, to be set free through its consumption, than was expended in obtaining it. Consequently, the value of work is usually a little more than the value of the antecedent work from which it was evolved. To these advances persistently utilized — advances converted into abilities, abilities in turn put forth in work — the progress of mankind from savagery to civilization has been due.

Occasional and individual misadjustments between needs and work are sure to occur, because social changes make misadjustments of every possible kind. It is in order then to inquire how the misadjustment comes about, and what is its true correction. It may be that men whose needs have been and are fully supplied are not converting their supplies into an equivalent of useful work, or it may be that men who are willing to work and have the will to develop their abilities beyond present

[1] Professor Sumner's assertion: "Whenever nature yields to man an atom which he has not earned, or advances it one second of time before he has earned it, we may all turn socialists and utopists" (Collected Essays in Political and Social Science, p. 50), contradicts the truth of both biology and history.

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limits are inadequately supplied with what they need. Obviously the remedy in the one case is to bring educational disciplines to bear; in the other to correct, as far as possible, errors in distribution. The correction belongs for the most part within the sphere of moral effort, education, and philanthropy. It belongs to economic effort so far as the value of the laborer's work falls below the amount that will both recompense him for energy expended, and afford him something for the development of his potential abilities; for this is its natural value, the value nature commonly gives it. The rule of ideal distribution is, to each according to the full natural value of his work.

II.

Such being the ideal, how far does the competitive process tend to make it actual? What is the rate of wages in the absence of self-conscious agencies acting in other than competitive ways?

English political economy has always more or less distinctly affirmed that in any society there is a certain natural rate of wages. The first description of natural wages was strikingly different from the definition that soon after gained acceptance. It was Adam Smith's saying, — the first sentence in his discussion of wages, — that "the produce of labor constitutes the natural recompense or wages of labor," and was made in view of "that original state of things" when there was neither landlord nor master, and the whole produce of industry belonged to the laborer. The truth, so fundamental in our modern philosophy of wages, that in a later industrial state also — when the active population has been differentiated into various classes of employers and employed — the wages of the laborer are still approximately equivalent to what he produces, is not worked out in *The Wealth of Nations*. If Adam Smith ever distinctly perceived that the employer's profit is value created by his own services, not by the laborer's exertions, the idea was no link in the chain of thought that took shape in the chapter on wages. Consequently, in treating of

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labor as conditioned by landlord and master, his thought gravitates to the minimum limit to which wages can be forced by competition. "There is, however," he says, "a certain rate below which it seems impossible to reduce, for any considerable time, the ordinary wages even of the lowest species of labor." This rate is the wage that will maintain the laborer, and enable him to rear another laborer to take his place in the next generation. If the wealth of a country were stationary, the competition of the laborers and the interest of the masters would soon reduce wages to this lowest rate which is consistent with common humanity. If wealth is increasing, and so long as it continues to increase, wages will be above the minimum. If wealth were decreasing, wages would fall below the lowest humane rate until, by famine, "the number of inhabitants in the country was reduced to what could easily be maintained by the revenue and stock which remained in it."[1]

This analysis was seized upon by Ricardo, who condensed it into a definition. Giving a new, and, as it proved, permanent meaning to the term "natural" which Adam Smith had used in a sense so different, Ricardo defined natural wages as "that price which is necessary to enable the laborers, one with another, to subsist and to perpetuate their race without either increase or diminution."[2] To its author this definition meant a great deal more than the words explicitly affirm. Saying nothing of Ricardo's analysis of minimum wages in terms of food, which we need not follow, it is plain that the limit below which he supposed wages could not permanently fall is considerably above the minimum described by Adam Smith. He assumed that the laborer was master of the minimum rate below which wages could not be permanently lowered. "It is not to be understood," he said, "that the natural price of labor, estimated even in food and necessaries, is absolutely fixed and constant. It varies at different times in the same country, and very materially differs in different countries. It essentially depends on the habits and customs of the people." It is safe to say that

[1] The Wealth of Nations, chapter viii.
[2] Principles of Political Economy and Taxation, chapter v.

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if this last assumption of Ricardo's had been warranted by the facts of the actual industrial world, English political economy would have escaped the wrath of humanitarians and the name of a dismal science. But when John Stuart Mill restated and elaborated the body of doctrine evolved by his predecessors, he was not long in proving that the moral minimum of wages was a myth. Any disadvantageous change in the circumstances of laborers, — that is, any reduction of actual below natural wages, — he pointed out, "may permanently lower the standard of living of the class in case their previous habits in respect of population prove stronger than their previous habits in respect of comfort. In that case the injury done will be permanent, and their deteriorated condition will become a new minimum tending to perpetuate itself as the more ample minimum did before;"[1] and this has happened and does happen so frequently as to render all propositions ascribing a self-repairing quality to the calamities which befall the laboring classes, practically of no validity.

III.

Yet it does not follow that there is not a true natural rate of wages, well above the limit at which a man must starve or beg. There is a soul of truth in Ricardo's idea, and it happens to be the only part of the doctrine that the economist, as such, is really concerned with. Far above the limit of mere subsistence there is a limit below which the permanent reduction of wages is uneconomical. The maximum production of wealth depends on the most complete and perfect division of labor, and the division of labor depends not only on the extent of the market but on the size of the population. The extent of the market itself depends on the size of the producing and consuming population, and an occupation can become differentiated from allied occupations and developed into a distinct trade, business, or profession, only when there is a considerable number of persons to engage in it. There is, therefore, a limit below which the reduction of the laboring population reduces the incomes not

[1] Principles of Political Economy, book ii, chapter xi.

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only of laborers themselves but of all classes in the community. The farmer cannot develop the resources of his land, or the manufacturer increase his product. The reward of management is curtailed and interest reduced. Again, there is for each laborer a maximum efficiency in proportion to his consumption. Up to a certain point the more real wages put into him the more useful service can be gotten out of him. To quote once more from Adam Smith, the industrial experience of a century has been but cumulative proof of his saying: "A plentiful subsistence increases the bodily strength of the laborer, and the comfortable hope of bettering his condition and of ending his days in ease and plenty animates him to exert that strength to the utmost."[1] As statistical science and methods improve, it should be possible to ascertain the economical rate of wages for any given occupation at any given time, and with a fair approximation to accuracy, by means of statistical averages drawn from selected results. These would include statistics of the cost of labor of the same nationality, employed under substantially similar conditions except differences of real wages.

Now this economical rate is none other than the ethical rate. To give the laborer the wage that calls out his full efficiency and affords him a comfortable hope for old age, is to give him no less than that sum which is sufficient to develop his potential abilities. In communities accustomed to change and progress, the actual rate of wages must equal this ethical and economical rate, or fall very much below it. Where the ideas and aspirations of the successful are communicated to all classes the laborer can never remain in an equilibrium of contentment. The stimulus and tone of his life is the prospect of doing better. Remove that stimulus and he does not simply remain a stationary economic quantity, he deteriorates from that moment. His efficiency is impaired, he adds less and less to the world's sum total of wealth. Losing the ambition to do as well as he can, he loses also the ambition to live as well as he can, to make the most of what he has. He falls into unsanitary habits. His vitality and that of his children is impaired, and, while he may

[1] The Wealth of Nations, chapter viii.

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have as many children as he would have if living in wholesome prosperity, not as many of them will survive to maturity. Both in efficiency and in numbers the labor force is diminished, and the total production of society is lessened. Consequently, in a community advancing in wealth and refinement, that cannot be an economical rate of wages which is insufficient to enable the workingman to share in the general expansion of life.

Giving to the laborer the full natural value of his work, the economical rate of wages is no less than the produce of his labor. The economical rate, moreover, is the rate to which wages actually would conform if competition were governed only by the expectation of gain, and the losses of excessive competition could not be shifted by the competitors upon others. Competition carried to the extent of keeping wages as low as this rate is beneficial to all. It forces men to make the most of their opportunities, it sharpens thought and disciplines character, and calls the creative powers into fullest action. Carried the least degree farther, competition merely deadens and destroys, and the majority of men do not habitually carry competition to destructive lengths when acting freely by the impulse of natural motives. The economic limit of competition is its natural limit — not always its actual limit — and the rate of wages made by competition restricted within this limit is a natural rate.

Therefore, in the fullest sense, the economical rate is at once the true natural and the true ethical rate of wages. Stripped of fallacy and rightly developed, the Ricardian doctrine of natural wages is identical with the earlier affirmation of Adam Smith. The natural remuneration of the laborer is the produce of his labor, and in an improving society this produce is not less than the "reasonable" and "sufficient" wages which humanitarian feeling demands.

IV.

Let us now inquire to what extent the actual rate of wages, so far as competition determines it, tends to conform to the natural rate.

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The wages-fund doctrine has been finally overthrown, and it has been abundantly demonstrated that the actual rate of wages is made by the productiveness of industry; but the proposition has not been reduced to perfect definiteness. That is to say, it is no longer disputed that wages are more when product is more and less when product is less, but there is still dispute whether increasing production tends to benefit chiefly the employer or chiefly the laborer. The decisive answer to this question will be given some day by statistics. Meanwhile we can satisfy ourselves on two important points.

The formula of Cobden that wages rise when two bosses are after one man and fall when two men are after one boss, means that every increase in the number of employers who can make a sufficient profit from their business to maintain themselves as employers, acts favorably on the rate of wages. And this is true, notwithstanding the fact that consolidations of productive undertakings, concentrating them in the hands of the most competent men, are attended with economy of production. So long as new employers can find a place in any industry, and profitably maintain themselves in it, the benefits arising from concentration have not yet been distributed in wages and reduced prices of utilities. The profits of the employers hitherto in the field have been abnormally large. It is not the intrusion of poorer employers into the field that increases the profits of abler employers, any more than it is the actual resort to poorer land that increases the rent of better land. It is the increasing value of the produce of the best land, due to its failure to supply an increasing demand upon it, that makes the profitable cultivation of poorer land possible and affords rent to the best. The actual cultivation of the worst land that can be cultivated with profit establishes a limit beyond which the value of the produce of the best land cannot rise. But for the produce of poor land the owners of fertile land could obtain famine prices.[1] So of employers. If there is any condition necessitating a resort to poorer employers it is the failure of the best

[1] Malthus understood, or at least stated, the cause of rent more accurately than Ricardo. *Cf.* James Bonar, Malthus and his Work.

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employers to supply the demand for employer functions. The number of men of superlative business genius is small, and the powers of the ablest men are not unlimited. If there were no resort to a commoner grade of talent the value of the employer function would rise above any assignable price. So far from [illegible]cting in any way from the laborer's real wages, the multi[illegible]ion of employers who can sustain themselves above bank[illegible]y reduces the prices of goods and increases the wages of [illegible]r.

Does a condition of improving industry tend to multiply [illegible]mployers? The true answer to this question is that the number of employers tends to multiply just as far as the more gifted employers, or combinations of gifted employers, fail to discharge the employer function with decreasing cost to the community, thereby leaving for real wages an increasing portion of the total product of industry. This law is absolute. That combinations economize production we know. It is one of the most striking phenomena of modern industrial life. It is as if the owners of superior lands should discover some means by which increasing investments of capital in agriculture should yield increasing, instead of diminishing, returns. They could then drive the cultivators of the poorer lands out of the market if they chose, but only by dividing their increasing gains with consumers. Should they attempt to retain all, the humbler cultivators would again meet them in the market. It is the same with employers. Centralization of the employer function and the extinction of the smaller employers is possible only by conveying to the laborer a larger share of product than he previously enjoyed. There is, indeed, a limit in every industry beyond which the intrusion of new competitors will ensure the bankruptcy of some; and when that limit is reached the stronger survivors endeavor, by a judicious policy as to prices, to hold the field. But there remains the limitless domain of new utilities, and the specialization of utilities depends not only on that geographical extension of the market which Adam Smith described, but even more, under modern conditions, on the productiveness of industry, the greater or lesser incomes of

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the people. When a man's income is increasing he does not increase all his expenses in proportion; he adds some new ones outright, purchases some utilities that he did not enjoy before. When his income is decreasing he lops off some at a stroke.

From all this it would appear that in communities enjoying increasing prosperity the actual rate of wages must tend constantly to conform to that true natural rate which is at the economical and the ethical rate. That this is, indeed, the real tendency in the industrial nations at the present time there is much reason to believe; but there are, unfortunately, many exceptions extending over large areas of population and through long intervals of time. To conform to the natural rate would be the real tendency everywhere and always, if competition were always uniform and normal. But in the actual industrial world competition is never uniform, and because not uniform it is often carried to ruinous excess.

V.

I have elsewhere shown that the competitive process, judged by economic or ethical standards, is inherently defective,[1] and this because, like all natural processes, it assumes a rhythmical form. "Competition begins only after gains in excess of normal profits have accrued to employing producers. As a consequence of this fact, when competition does begin it goes to excess." When, passing the normal limit, competition assumes that terrible intensity that presages business ruin, the employer is driven to every expedient to save some part of his narrowing margin of profit. The readiest expedient, the most available for the moment, though costliest in the end, is the exploitation of wages. In a mild way this is done by tacitly or openly restricting competition in the purchase of labor. Whatever brings additional employers into productive enterprise and intensifies competition in the sale of products will naturally intensify competition in the purchase of labor; but we must be careful not to confound the two processes. To some extent it

[1] The Theory of Profit Sharing, *Quarterly Journal of Economics*, April, 1887.

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is easily possible for employers to separate them in their industrial practice, thereby adding to their profits a sum that would otherwise be added to wages. In its worst and most brutal form the exploitation of wages becomes a positive extortion from working men and women who have been reduced by misfortune to such straits that all power of resistance is gone. It becomes the "sweating" system of the clothing trades, the "plucking" system of the coal districts. Between these extremes are all those gradations that substitute the labor of women for the labor of men, the labor of children for the labor of women, and replace the native laborer with a foreign competitor of a lower grade of life. All these exploitations, reducing wages below the true economical rate, react disastrously on production, in time, and are contrary to the interests of employers as a class; but they profit for a while, and may continuously profit the individual employer who can shift upon society or his competitors the losses that his practice creates. He divides his ill-gotten gains with the consumer, and thereby, controlling the market, compels worthier competitors to adopt his methods.

Now to these deplorable results of ill-regulated competition there is no automatic correction, springing from motives of individual self-interest, that meets the case. The wide-spread belief that, if the exploitation of wages is carried so far as actually to enrich the employer, the sum so gained, if converted into capital, will return to labor, is still shared by many respectable economists. It is true to the extent that increasing capital does act favorably on wages. In overthrowing the wages-fund doctrine economists have somewhat lost sight of the real function performed by capital in employing labor. The owners of accumulating capital, casting about for productive investments, select, according to their best judgment, those that promise to yield the best returns. Labor for such new enterprises must be drawn, by the offer of increased wages, from other employments — to some extent even when there is a large body of unemployed workmen, since the unemployed are always the relatively inefficient. Even the replacement of old capital gives

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rise to this process of selection among actual and possible enterprises with reference to their anticipated profitableness, and the consequent drafting of labor from the less profitable to the more profitable employments. The accumulation of new capital amplifies and accelerates it. Hence the ratio of capital to population, though having in its static aspect no such relation to wages as the old doctrines ascribed to it, has yet a dynamic relation that is definite and important. But when the capital has been wrung from labor, the original wrong is never righted. The capital has become the property of the employer, and has increased his power. The way in which it has been obtained has cultivated the disposition to acquire power in that way by continuing to exploit wages, even when industrial conditions no longer afford an excuse. The loss sustained by the laborer may never be repaired, for degradations of men and women are converted into organic changes. A lower type of life is the result, and ultimately the reaction is completed in a positive impairment of the productive force of the community.

Neither are the evil results of unequal competition corrected by efforts springing from altruistic motives, so long as these are not reinforced by associated action. The ultimate cure for industrial evils is, indeed, in the growth of altruistic feeling. Employers must cease to exploit wages, either to avoid loss or to increase their profit and power. They and others must endeavor, by personal help and encouragement, to counteract the tendency to degradation in the unfortunate and discouraged. But that these efforts on the part of those who have the disposition to make them may avail, a restraint must be put on those who have no such disposition. Unselfish men, acting as individuals, without reference to each other, would be crowded out in the struggle for survival. That ninety-nine fair employers may have a chance, there must be some restraint upon the hundredth unfair one; and that restraint can be effectively organized only by the interests injuriously affected. It must be their united resistance and co-operation.

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VI.

So we are brought, at last, to consider the action of those self-conscious forms of feeling and opinion which undertake to govern the competitive process by such means as the policy of labor organizations and legislation. What can they accomplish?

It requires neither argument nor marshalling of facts to prove that by no means whatever can employers be forced to surrender from their gross profits, for addition to the wages of their employees, any part of the sum that constitutes the normal reward of the employer function. Any attempt, temporarily successful, to secure more, would simply drive employers out of business and throw labor out of employment. But when competition among the undertakers of enterprise is carried to its full normal limits there will be no ulterior profit in excess of such reward of the *entrepreneur* function as will maintain that function unimpaired. With capital accumulating for investment, the competition of producers as sellers of their products is sure to reach its full normal limits. The only sums, then, that can be added to wages by any means whatever are: First, the sum labor is in danger of losing, either (1) through the failure of employers to compete as freely as purchasers of labor as they compete as sellers of products, or (2) by that merciless competition which takes advantage of the laborer's ignorance or weakness to rob him and divides the plunder between the employing producer and the buyer of goods. Secondly, the sum that might be produced by calling into action any potential manhood and ability of the laborer that actual competition fails to develop. Can as much as this be accomplished?

The power of the labor organization is the strike, actual or in reserve, and back of the strike the ability of the organization to hold together. Unless there is some ulterior motive for permitting the strike, the employer can better afford to yield to the demand of labor any sum less than the amount the strike will cost him and not exceeding the aggregate of the sums above described as possible additions to wages. Let us designate this aggregate by d and the cost of the strike by c. Included in the

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sum d will be a sum d' which, if d does not go to labor, cannot go to the employer. It is the sum wrested from labor by the illegitimate forms of competition and given to the consumer in an abnormal reduction of price, as for example in the case of the white underclothing made by sewing women. All that an employer can add to his own profit at the expense of labor is $d-d'$. If, now, the demand of labor over which a strike is threatened is for a sum exceeding d, the employer has no alternative but to resist until labor is starved into submission or the business is indefinitely suspended, since he may as well quit business entirely and accept a salary as to permanently surrender a part of the normal and equitable reward of his own services. Again, if there is a good prospect that labor can be brought to surrender before the cost of the strike c, plus d' (the sum conveyed by competition to the consumer) amounts to the sum d, it is the employer's policy to resist it for the sake of saving as an addition to his profit the remainder, $d-(c+d')$. If, on the other hand, labor can hold out until $c-d'$ equals d, the employer can better afford to surrender at once the entire sum d, unless there is an ulterior object to be gained by resistance.

Such an ulterior object, if it could be achieved, would be the discouragement of organized and concerted action by labor, and it could be achieved if the sum to be lost by labor in maintaining its organization was greater than the sum to be lost by permitting its disintegration or if the organization of labor limited and weakened itself by mistakes of policy. On the contrary, if labor must lose as much by disintegration as it can possibly lose in defending its organization, and if the amount that the employer can add to his own profits by breaking down the organization is small at the best in proportion to the sum that labor can gain by concerted action, employers will not follow a policy of warfare against labor organizations.

And these, it is easy to see, are the actual facts. The sum that labor has to gain is the sum d. The utmost that the employer can add to his profit is $d-d'$, the sum withheld from labor by unequal and illegitimate competition, less the sum conveyed by illegitimate competition to the consumer. And the

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loss by labor of the sum *d* means, as we have seen, the progressive degradation of labor. If the loss is inevitable, workmen may as well lose by strikes as by competition with each other. They can afford to sacrifice in defence of organization all that it is possible for them to lose.

By organization, therefore, labor can secure the whole sum *d* when abnormal competition tends to convey it to employers and mers, and the organization can be broken only by its own ts of constitution or mistakes of policy. The principles rning the coherence of the labor organization are the same those governing the coherence of combinations of producers. is essentially defensive, not aggressive. It is more or less coherent as it is more or less homogeneous in composition. It can only correct the results of imperfect competition and bring illegitimate competition within normal limits. If it attempts to secure more than the sum *d*, it curtails employment and sets up economic reactions against the whole wages class. And it must allow to its members the best wages they could severally make by their individual competition. Men will join and remain in labor organizations only if they can thereby secure better wages than they can secure by individual efforts. They will secede if their superior abilities are refused reward, or if mistaken policy reduces wages below the sum they could command as individuals and still be above the minimum at which resort to charity begins. The Knights of Labor in their earlier organization violated the law of homogeneity. In reorganizing on trade lines they are attempting to conform to it. Trade unions have traditionally made the mistake of refusing to allow to the best workmen the wages they could command as individuals.

We need not linger to prove that arbitration and legislation, so far as they have to do with wages, are subject to the same general limitations as the policy of labor organizations. They have to do only with securing to labor the sum *d*. They can add to wages only the sum that would be added by competition in the purchase of labor as perfect as the competition in selling products, and by restriction of competition in selling products to normal limits.

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VII.

Must we not therefore conclude that the rate of wages is made mainly by the competitive forces, and that the moral forces, acting through organization and public opinion, are powerful to correct the distributive errors caused by the inherent defectiveness of the competitive process, but that, beyond such corrective work, they are unavailing? Apparently we must, if we co[illegible] the direct process only. But beyond the direct, immediate pr[illegible] is an indirect process in which moral forces have a larger sw[illegible] We have seen that on the productiveness of industry depe[illegible] not only the absolute amount of the laborer's remuneration, bu[illegible] also its relative amount, the proportion it bears to the whole product. And that the productiveness of industry is conditioned by the moral quality of the people is no new truth of either political economy or practical wisdom. Whatever personal or associated effort, education or legislation, can do to develop the physical vigor and moral powers of workingmen, will amplify the product of their labor and increase their incomes. It will narrow somewhat the gulf between the abilities and incomes of the few and those of the many. The function of the man of business is essentially that of co-ordinating the factors and processes of the economic world — labor, capital, invention, and superintendence in the factory, supply and demand in the market. Throughout organic nature, and no less in human society, the co-ordinating function is useful and costly compared with the mere expenditure of energy in direct and simple ways. If the many are to share in the great rewards now enjoyed by the few, they must become competent to assist in discharging the functions now discharged by the few. This thought suggests another, that, perhaps in a much more direct way than has been supposed, the more serious economic disturbances of modern times, those industrial depressions that follow the enormous displacements of capital and labor which invention and discovery are continually making, are aggravated or mitigated by the intellectual and moral qualities of the people. For on what else does the utilization of such changes with least

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loss depend, than on the ability of the people to make quickly and easily the necessary readjustments? This is a large and perhaps a fruitful subject, on which we cannot enter at this time. It is sufficient to know that, if not in the way contemplated by Ricardo, yet in a way immeasurably more important, the rate of wages depends on "the habits and customs of the people": above all on the habit of "acting upon each other not as the forces of inorganic nature work, in blind impact and resistance, but rather as the forces of organic life, assimilatively — each finding his ends in the ends of the others, and all working in and through the others for the development of one organic social whole, in which each individual is at once the means and the end of all the rest."[1] The growth of this habit will continually raise the natural rate of wages — the rate below which reductions are wasteful and immoral. The competition that forces actual wages down to that natural rate — to the rate, that is, that rewards a man according to the use he makes of the powers with which he is endowed, affording him the means to develop them, but not to idle them away — also tends, no less certainly, to raise the natural rate, for it stimulates effort and quickens thought. It is the chief cause of intellectual progress and systematic endeavor. Legislation, arbitration and efforts of organizations, so far as they correct the tendency of competition to reduce actual below natural wages, play their part also in raising the natural rate. Carried the least degree farther, they but interfere with the normal action of other forces, and thereby retard progress.

FRANKLIN H. GIDDINGS.

[1] Daniel Greenleaf Thompson, The Problem of Evil, p. 280.

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LOCAL GOVERNMENT IN ENGLAND.

THE character of the English system of local government was fixed at the time of the conquest of England by the Normans. What Saxon institutions remained were so changed as to be simply reminiscences of a time that was past, and exercised but little influence on the future. William the Conqueror's conception of his relations to his new dominion is of great importance, since on it was based the system of administration that he founded. He believed that he held the country as the devisee and the legitimate successor of Edward the Confessor.[1] In this claim he was supported by the pope; and the fact that he had to back up his claim by force altered in no way his position in the law. The result of such a claim, if successfully prosecuted, was that every Anglo-Saxon who resisted it was deemed guilty of treason and his property was forfeited. "Those who were willing to acknowledge William were allowed to redeem theirs, either paying money at once or giving hostages for the payment."[2] In this way most of the landed property in the kingdom came into the possession of the Conqueror, who then granted it out again to his adherents and to the Anglo-Saxons who decided finally to cease resistance to his claims.[3] This procedure was, of course, not calculated to produce peaceful relations between the two national elements of the population. All classes were indeed reduced to the most complete submission to their sovereign. But Norman was hated by Saxon and despised him in return. It became impossible, as Gneist points out,[4] to conduct the government on the old plan while these feelings existed. Little freedom could be granted to the localities if every matter in their jurisdiction

[1] Stubbs, Const. Hist., vol. i, p. 257, with authorities cited.
[2] *Ibid.*, p. 259, note 1. [3] *Ibid.*, p. 260.
[4] Gneist, Selfgovernment, Communalverfassung und Verwaltungsgerichte, S. 14.

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was to be decided from race motives. Some new system of government must be established by means of which the peace might be preserved and the king might stand as an impartial arbiter between the conflicting race elements of the nation. Impelled by these reasons as well as by his naturally despotic turn of mind, William districted his new kingdom, — using in the main the old divisions that had come down from Anglo-Saxon times, — and placed in each district an officer on whom he could rely to enforce his orders and carry out his plans. Little power was given to the people of the localities; most governmental functions were entrusted to the royal officers.

Such was the character of the Norman system of local government imposed upon the old Anglo-Saxon autonomy; and such is the character which the English system of local government has preserved to a comparatively recent time. This fact gives us the clue to the method of treating the subject: it must be studied from the standpoint of officers rather than from that of districts. I shall take up the different officers in their historical order; and I shall begin with the sheriff, who was the most important officer in the early Norman system of local government.

History of the Offices.

I. *The Sheriff.* In each of the old shires or counties, whose boundaries had been fixed during the Anglo-Saxon period and were, for the most part, identical with those of the old Anglo-Saxon kingdoms,[1] was placed an officer, appointed and removed by the king, called the *vice-comes*. This officer resembled in many ways the Anglo-Saxon shire-reeve (*scyr-gerefa*) and finally came to be known by the English name of sheriff. This office was regularly appointive, and has remained so to the present day; the acceptance of the appointment has from time immemorial been obligatory, and the term of office is for a year.[2] But any one who has served for one term is exempt from service for the next three years.[3] Almost the only practical qualification for the office is that

[1] Gneist, Selfgovernment *etc.*, S. 77. [2] 14 Edw. III, c. 7. [3] 1 Richard II, c. 11.

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the appointee have a sufficiently large landed estate in the county to ensure his pecuniary responsibility for his good conduct.

Originally the functions of the sheriff were very extensive — so extensive indeed as to make him the viceroy in the county for which he was appointed in all matters relating to the financial, military and judicial administration.[1] We may, in accordance with our modern terminology, classify his original function as judicial and administrative. His judicial functions were discharged in the courts of the county — the county court proper and the court known as the sheriff's tourn.

The county court, when acting under the direction of the sheriff, was originally by far the most important authority in the county. Stubbs says that it

> met twice a year under the sheriff or his deputy, and was still competent to declare folk-right in every suit. . . . It had a civil as well as a criminal jurisdiction as before [*i.e.*, in the Saxon period], although the management of the pleas of the crown on the one side, and the interference by royal writ on the other, must have materially affected its independence.[2]

But the importance of the county court together with that of the sheriff gradually diminished. The *iter* of 1194 formed, or at least defined, the grand jury, and forbade the sheriffs to act as itinerant justices in their own shires;[3] while the consolidation of the judicial power in the hands of the itinerant justices and in the *curia regis* limited very much the power of the sheriffs.[4] In 1215, Magna Charta forbade the sheriff to hold pleas of the crown.[5] Also the provision, by the *iter* above referred to, of other officers, the coroners, who were given concurrent power to attend to the pleas of the crown, was another limitation on the power of the sheriff.

The sheriff's tourn grew out of the county court, as Blackstone says, "for the ease of the sheriff," and was simply the

[1] Stubbs, Const. Hist., vol. i, p. 276.
[2] *Ibid.*, p. 394.
[3] *Ibid.*, p. 505.
[4] *Ibid.*, p. 606.
[5] Art. 24. For the general decline of the county court, see also Blackstone, IV, 37.

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court leet or petty criminal court which the sheriff, in his turn or circuit, held twice each year in each respective hundred of the county. The gradual development of this court was another cause for the decline of the county court. Its original purpose was to view the frankpledge.[1] Besides this it was a minor police court.[2] But the tourn met with the same fate as the county court. Magna Charta prohibited the sheriff's tourn, as well as the sheriff and county court, from hearing and determining important criminal matters,[3] leaving to the sheriff's tourn simply a police jurisdiction, which was finally assumed by the justices of the peace in quarter and special sessions.[4]

This slight historical review is sufficient to show that the judicial functions of the sheriff have one by one been transferred to other officers or authorities, and that all that is left of his great powers can be classed as administrative functions.

Originally the sheriff had much greater administrative powers than at present. He was the head of the county militia; but he has lost all military powers as a result of a reorganization of the county militia under the lord lieutenants and deputy lieutenants. He was also chief of police in the county; but most of his police powers have been given to the justices of the peace and their subordinate constabulary. He is still, however, regarded as one of the royal conservators of the peace; and in such capacity he may arrest all persons guilty of breaking the peace of the county, may bind any violent person over to keep the peace, and as a final resort may call out the *posse comitatus* to quell an uproar. But he rarely if ever does this, as the new constabulary and the militia are amply sufficient for this purpose. He also had charge of the royal finances, and is still, in theory, the king's bailiff and has to see that the fiscal rights of the king are preserved; but through the great change in the financial system, since the time when the office of sheriff was established, almost nothing

[1] In accordance with an old Anglo-Saxon and Norman custom, the freemen of the liberty were all mutually pledges for the good behavior of each other.

[2] Blackstone, IV, 273.

[3] Art. 24.

[4] For example, see statute 1 Edw. IV, c. 2, which distinctly provides that certain parts of the jurisdiction of the sheriff's tourn are to be exercised by the quarter sessions.

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is left of these functions save the taking possession of confiscated property and of strays. The only really important functions now discharged by the sheriff have reference to elections for coroners and members of Parliament, and to actions in the higher courts of the county, of which he is a ministerial officer. Most of these duties are performed by subordinate officers, for whose actions, however, the sheriff is responsible.[1]

The period during which the sheriff exercised his most important functions extended from the Conquest to the reign of Richard II, and may be regarded as the most flourishing period of the Norman system of prefectoral administration. The king was supreme at the time and the government was personal to the last degree.[2] During the greater part of this period there was no Parliament to restrain the actions of the king; and to this complete absolutism is due the fact that England was consolidated into a nation so much sooner than any of the peoples of the continent. The subjugation of the English people was so complete that there was little opportunity for the development of that feudal *régime* which delayed so long the formation of a national feeling in France and Germany. But with the complete welding together of the various localities and classes into one nation came very soon the demand on the part of that nation for some share in the administration of the government. In the domain of local government this demand was satisfied by the creation of new offices. The first of these was the office of coroner.[3]

II. *The Coroner.* The coroners were originally chosen from among the knights of the shire as assistants to the sheriff, but with a certain control over him. It is supposed that they were originally appointed by the king, but that the right of presentation which the county courts possessed developed into a right of election. However that may be, it is certain that from a very early time the coroners were elected by the county

[1] Blackstone, I, 340 *et seq.* [2] Stubbs, Const. Hist., I, 338.

[3] Gneist, Selfgovernment, S. 96. It must be admitted, however, that the origin of this office is somewhat obscure. Blackstone (I, 346–349) considers it to be as ancient as that of the sheriff. But see Stubbs, Const. Hist., I, 505, whose description of the origin of the office seems to agree with Gneist's.

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courts, upon a writ *de coronatore eligendo* issued by the central government to the sheriff, who then called the county court together for this purpose.[1] The office of coroner was the only important office in the old English system of local government that was filled by election. The most important business of coroners at present is the investigation of cases of sudden [illegible]. This is governed by the statute 4 Edw. I, c. 2, *de officio [illegible]iatoris*. Their other police functions, *i.e.*, the keeping of pleas of the crown, were taken from them by Magna Charta, [illegible]icle 24. It should be added that the coroner is also a minis[illegible]rial officer, and performs the duties of the sheriff in case that officer is incapacitated for suspicion of partiality. There are, in all, from four to six coroners in every county.

III. *The Constable.* The office next in date of creation is that of constable. Blackstone[2] derives this office, as it existed in latter times in England, from the great office of lord high constable, which was practically abolished at the time of the attainder of Stafford, duke of Buckingham under Henry VIII. The derivative office dates back to the statute of Winchester,[3] which directs that two constables in every hundred shall inspect all matters relating to arms and armor. They were originally appointed by the courts leet; but afterwards, when the justices of the peace supplanted the old courts leet, they were appointed by the justices.[4] At first their functions had to do with the militia organization and they were officers of considerable importance, but they soon lost their military character and became simply officers for the keeping of the peace. Their original independence was lost when they became the appointees of the justices; they were obliged to act under the direction of these officers.

IV. *The Justice of the Peace.* The officers above described, the sheriff and constable — or, in particular districts with charters of their own, other officers of similar character, — conducted the business of government satisfactorily for a long time; but

[1] This election is now regulated by the statute 7 & 8 Vic. c. 92.

[2] Vol. i, p. 355. [3] 13 Edw. I, c. 6.

[4] Blackstone cites statute 14 & 15 Car. II, c. 12, and Salk. 150.

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as the country grew more populous and the business of government more difficult, the sheriff's tourn, the main police court, became unequal to the task imposed upon it, and a new office was established, which finally became the most important in the entire English system, namely, that of justice of the peace. The origin of this office is not quite clear. Blackstone says —

> When Queen Isabel, the wife of Edward II, had contrived to de her husband by a forced resignation of the crown, and had set up son Edward III in his place, this, being a thing then without exan in England, it was feared would much alarm the people; especially the old king was living, though hurried about from castle to castle, t at last he met with an untimely death. To prevent therefore any risings or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsingham (Hist. A.D. 1327), giving a plausible account of the manner of his obtaining the crown, to wit: that it was done *ipsius patris beneplacito*, and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritance, and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in Parliament (Stat. 1 Edw. III, c. 2) that for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the country, should be assigned to keep the peace. . . . But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Edw. III, c. 1, gave them the power of trying felonies; and then they acquired the more honorable appellation of justices (Lamb. 23).[1]

Gneist, on the other hand, regards the appointment of the justices as the result of the complete breaking down of the Anglo-Saxon and Norman method of attempting to keep the peace by means of the frankpledge. This custom became so burdensome that, soon after the adoption of Magna Charta, two statutes, that of Merton[2] and that of Marlborough[3] released the most important persons of the population from the view of the frankpledge, that is, the revision of the lists of the responsible inhabitants, and made practically nugatory the old system of police. The appointment of the constables a few years later[4]

[1] Blackstone, I, 350.
[2] 20 Henry III, c. 10.
[3] 52 Henry III, c. 10.
[4] 13 Edw. I, c. 6.

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was an attempt to form a new police system in which there should be officers with the power of arrest who should be responsible for the preservation of the peace. This plan was not at all successful. Experience showed that the preservation of good government demanded the presence in all the localities of permanent officers of sufficient dignity to command the respect of the inhabitants of the district. The reigns of the three Edwards were a time of experiments in governmental organization, which varied between centralization and decentralization,[1] until finally the statute of 34 Edward III, c. 1, provided for the appointment in all of the counties of these justices of the peace. Two years later, as the result of a petition of the Commons, a clause was inserted in the commissions of the justices that they should meet four times a year in common sessions for the county. The scanty knowledge of the law possessed by most of the justices led the Commons again to petition, in the reign of Richard II, that at least two persons learned in the law should be compelled to act in the consideration of all felonies. The answer to this petition was the statute of 17 Richard II, c. 10, which distinguished two classes of justices, those learned and those not learned in the law. The former, to the number at least of two, must be present and act in felonious cases, and, from the wording of the commission which was issued to them, became known as the justices of the *quorum*. As, however, the knowledge of the law and general information spread among the higher classes from which the justices were chosen, the custom arose of appointing all the justices to the quorum, as is the case at present.[2] The number of the justices in any county does not seem to be limited, though it was so at first. They are all appointed by the crown, and with very few exceptions have been so appointed from the origin of the office; but a property qualification of a considerable amount has always been necessary. The office was originally obligatory, but service as justice was paid by means of a

[1] It was during this time that the office of sheriff was made elective. But this failed of good results. See 28 Edw. I, c. 8, and 9 Edw. II.

[2] Gneist, Selfgovernment, S. 103-4.

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per diem allowance. Now it seems not to be obligatory, and for many years it has been unsalaried. The term of office is practically for life, though in theory a justice of the peace may at any time be dismissed from office by the central government.

These officers it was who gradually came to discharge all the police and administrative functions that were in old times discharged by the sheriff and the courts of the county. While the sheriff was perhaps the best hated officer that England ever possessed, the justices seem to have been popular from the very outset. Statute after statute enlarged their powers until they became by far the most important of all the officers in the English local government system, discharging both civil and criminal judicial functions and having the greatest influence over the entire local administration. A change in the militia system in the time of the Tudors greatly increased their power, since the lord lieutenants and deputy lieutenants then provided for[1] were personally identical in most cases with the justices of the peace. The lord lieutenant was at the same time the chief justice of the peace and *custos rotulorum*, or keeper of the records, and nearly all the deputy lieutenants were justices of the peace. The functions discharged by the justices under this arrangement have since been lost. During the Tudor period another change took place, which also added to the importance of the justices of the peace: they were entrusted with supervisory powers over the new communal administration that sprang up at this time in connection with the church parishes. The needs of the parish churches had from a very early time led to the collection of voluntary contributions from those persons whose means allowed them to contribute. These contributions, coming with great regularity, finally developed into a tax; and it became customary for the heads of families to assemble periodically in the vestry of the church to decide upon the purposes to which the money raised should be applied. At these meetings the persons who were to have charge of the temporalities of the parish church — the church-

[1] Statute of 4 & 5 Philip and Mary, c. 2, 3; afterwards changed by a statute of 13 Car. II, c. 1, 6. See Hallam, Const. Hist., vol. ii, p. 133 and p. 313, note 3.

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wardens — were elected. After the Reformation, a canon of the church (canon 89) provided that one of these church-wardens should thereafter be chosen by the pastor, while the other should be elected by the vestry. On these church-wardens were bestowed many police functions which we should expect to find in the hands of the constables, but which either had not been given to these officers, or had been taken from them in consequence of the degeneration of the office.[1] The most important administrative function of the church-wardens was the care of the poor. The suppression, in the reign of Henry VIII, of the religious houses and congregations, which had previously assumed the care of the poor, necessitated an organization of charity by the state. Statutes of 27 Henry VIII, c. 55, and 43 Elizabeth, c. 2, compelled each parish to support its poor, and made the church-wardens overseers of the poor *ex officio*. Two or three other overseers were to be appointed in each parish by the justices of the peace. About the same time it was seen that the old method of keeping up the highways was quite inadequate. The parishes were responsible for their maintenance, and the highways were kept (or were supposed to be kept) in good condition by the imposition of fines and penalties upon any parish that did not do its duty. But there were no officers whose duty it was to see that the roads were in good condition, and the absence of all supervision was found very harmful. Accordingly the statute of 2 and 3 Philip and Mary, c. 8, provided for the creation of surveyors of highways. These officers were at first elected by the constables and church-wardens, but were afterwards appointed in each parish by the justices[2] and were made subject to their direction. These innovations gave to the parishes an administrative importance that they never had had before, and at the same time increased the power of the justices of the peace, in that the new officers were in many cases their appointees and were in all cases subject to their direction. A further and most important change in the position of the justices was that, in their courts of quarter sessions, they

[1] Gneist, Selfgovernment, S. 40.
[2] 13 Geo. III, c. 78.

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became the county administrative authority, usurping the position of the old county court.

The period in which the justices performed these functions forms the second stage in the history of the local government of England and lasted from the beginning of the reigns of the Tudors down to the beginning of the present century. The administration was much more decentralized than under the old Norman prefectoral system. All the officers were chosen in the localities which they governed. Most of them, it is true, were appointed, directly or indirectly, by the central government and were dismissed by it. But the fact that they received no salary, although service, as a rule, was obligatory and very arduous, made the *personnel* of the administration after all very independent, and kept it from falling into bureaucratic ways. The system really secured a very high degree of local self-government. It was conducted in accordance with laws of Parliament which often descended into the most minute details. In order that these laws might be observed, there was given to the courts a most extended control over the officers; especially over the justices of the peace, nearly all of whose actions might be reviewed by the judges of the royal courts by means of the common law writs of *certiorari*, *mandamus*, and prohibition

The system was not representative — not, at least, in the modern sense; and when its financial side became more emphasized, on account of the great growth of the local taxes through the increase of the poor rate, it was thought that some voice as to the amount of the taxes to be paid should be given to the taxpayers. This consideration led to the organization of elective boards, the establishment of which has wholly revolutionized English local government.

The Poor Law Amendment Act.

This brings us to the great reform movement which dates approximately from the Reform bill of 1832. The movement was in great part due to social changes. The application of steam-power to manufactures and the very general introduction

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of machinery revolutionized industrial methods, massed large populations in the cities, and gave to the possessors of personal property — that is, the commercial and industrial classes — an importance that they never had had before. This change in the relative importance and power of the property-owning classes led first to a change in the method of representation in Parliament — a change which was brought about by the celebrated Reform bill of 1832. By this bill the balance of political power was taken away from the nobility and gentry and given to the middle classes. As the system of local government which the English were at this time enjoying gave most of the power in the localities to the nobility and the gentry, it was only natural that the new political masters sought to discover some plan of local government by which their local influence might be increased.

Another reason for the change which followed was the necessity of wide-reaching reforms. The poor rates had risen to an enormous sum in the years immediately preceding 1832; and the anxiety of the authorities everywhere to throw the burden of supporting the poor on some other locality than their own had led to a complicated law of settlement which was totally at variance with the needs of an advancing industrial society. But the necessary reforms could only be realized by the establishment of a uniform system of administration. This implied a central control such as had not heretofore existed. In theory, the justices of the peace were subject to the guidance of the central government, and the central government could dismiss them from office if they disobeyed its instructions. But the high social position of the justices made it a delicate matter for the central government to send instructions to them, and even if such instructions were issued it was extremely difficult to enforce them. The threat of dismissal from office had no terrors for the average justice of the peace. Dismissal involved no pecuniary loss, since the justices received no pay. It was therefore no punishment, but simply relief from arduous and exacting duties. Hence the dismissal of a justice of the peace is rarely met with in later English history; and the

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power to send the justices instructions became finally a useless prerogative.

For these reasons one of the first resolutions passed by the new Parliament provided for a thorough investigation of the administration of the poor law. In 1833 the celebrated Poor Law commission was appointed and began its work. The result of this work was a report, published in 1834, which has been described as "perhaps the most remarkable and startling document to be found in the whole range of English, perhaps indeed of all, social history."[1] The plans for reform advocated in this report, and finally adopted in the Poor Law Amendment act of 1834, involved the following political results:

I. *Representation.* The tax-payers are represented by boards of elected "guardians." Each board has the care of the poor-law administration, as regards the raising of rates and the granting of poor relief in its district. The new districts, the "unions," are much larger than the old, embracing as a rule several parishes.

II. *Voluntaryism.* Another change is the introduction in the local government system of the principle of voluntaryism and paid service, instead of the historic English principle of compulsory unpaid service. No obligation to serve is laid upon the elected guardians, and all the actual work is performed by salaried subordinates who are paid out of the poor rates. This change is a result of the change in the social elements composing the board of guardians. All the justices residing in the union are *ex officio* guardians; but the difference of social position between this class and that of the elected guardians has made it difficult for them to work together. The result is that the justices have left the poor-law administration wholly in the hands of the elected members of the board. These elected members have, as a general thing, other business to attend to and cannot, or at least think that they cannot, spare the time to attend to the details of the work imposed upon them by their position. They prefer, by a slight increase of the rates, to relieve themselves of these arduous duties. All

[1] T. W. Fowle, The Poor Law (1881), p. 75.

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that the guardians really do is to attend to the raising and expending of the money necessary for the administration of the law. Only exceptionally conscientious guardians undertake the actual distribution of relief.

III. *Central Control.* The last point to be noted is the introduction of a most extended central control over all the acts of the guardians and of their subordinates. There were several reasons for the introduction of this control. In the first place, it was felt that some method must be devised to restrain that local selfishness which had been one of the greatest evils of the old system. If, under the new system, a locality show a desire to escape any of the burdens that are imposed upon it by the law, the central control can hold it to the performance of its duty. In the second place the new system does not offer the same guaranties as the old for the integrity and intelligence of the officers. Under the old system, as a rule, the justices of the peace — the most prominent men of the county — either did the work themselves, or had it done under their immediate personal direction; under the new system the detail-work of administration is entrusted to salaried subordinates of the boards of guardians. A third reason for the establishment of a central control has already been indicated, namely, the necessity of uniform administration.

As the needs of English society have increased, new administrative agencies have been demanded and devised for their satisfaction; and these new agencies have been organized on the same lines as the poor-law administration. The result of these changes has been to give England a dual system of local government. The old system of local government by the justices of the peace still exists, and is of the greatest importance in the county administration and in all police matters; but by its side we find elected boards acting under the impulsion and control of the central authorities at London. It is therefore necessary, in describing the existing local government of England, to examine separately each of these different systems, to sketch the functions of the various authorities in each, and to indicate the inter-relations of the old system and the new. I

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shall first describe the governmental functions of the justices of the peace.

The Present Position of the Justices of the Peace.

The functions of the justices of the peace at the present time are of two kinds: judicial and administrative. While the latter class of functions alone properly falls within the scope of the present investigation, it is necessary, in order to come to any understanding of the position which the justices still occupy in the English system, first to indicate their judicial duties.

I. *Judicial Functions.* We have seen that the justices were originally appointed as conservators of the peace. As conservators of the peace, they were from the earliest times what in this country we should call police judges. In this capacity their duties were from the beginning, and are now, of three distinct kinds. (1) They bind over all disorderly persons to keep the peace. (2) They act as the preliminary investigators of all crimes, even of felonies. In the performance of this duty, they have the right to issue writs of apprehension against any one who is suspected of having committed a crime. (3) Acting singly, or in petty and special sessions, they convict of petty offenses — commonly without a jury. Acting with a jury, and in the courts of general and quarter sessions when all the justices of the county meet together, they form the lowest criminal court and act as an appellate court in police cases. As a general thing, where the justice of the peace acts singly, the cases are purely police cases; while the cases tried in the courts of quarter sessions are often of a criminal nature.

In the exercise of these judicial functions the justices of the peace really act, in many cases, as administrative officials. The police cases which come before them are frequently administrative cases; that is, the matters dealt with are of an administrative character. English administrative law is highly *specialized:* its rules are brought, to a great extent, into the form of direct commands to the people, to do or to refrain from doing particular things. These commands are enforced by penalties;

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and the exaction of the penalties is entrusted to the courts.[1] The result of this specialization of the administrative law, this formulation of its rules as direct commands, has been an enormous extension of the powers of the English justices of the peace as police judges.

Besides these cases, in which the jurisdiction of the justices is judicial in form but administrative in effect, there is a further class of cases in which their action is more obviously administrative. Not all the laws whose execution is entrusted to the justices of the peace can be reduced to the form of simple commands. Certain matters must be left to their discretion. Thus it has been left to them to decide the questions of law and fact that arise in connection with removals under the poor law, nuisances, the assessment of local taxes, *etc.* In these matters the justice acts otherwise than in the foregoing cases. His decision takes the form, not of a conviction of a violation of the law, followed by the imposition of the proper penalty, but of an order, commanding that that be done which is proper in the premises. Here it will be seen that the justice acts rather as an administrative officer than as a police judge. But the analogy between the two sets of cases is so strong that they may well be classed together.

It should be noted that the justices of the peace have also a sort of a civil jurisdiction over such matters as the relations between master and servant and between master and apprentice.[2]

In many of the cases above set forth, it has long been necessary for two justices to act together; and the Summary Jurisdiction act of 1879[3] requires such concurrent action in almost all cases. In consequence of this and of previous acts, and by the practice of the justices, it has come about that their judicial business is commonly attended to when they meet for

[1] For further explanation, see "The Executive and the Courts, or Judicial Remedies against Administrative Action," POLITICAL SCIENCE QUARTERLY, December, 1886.

[2] *Cf.* any of the various manuals of the duties of the justices of the peace, *e.g.*, that of Burns. See also W. K. Wigram, The Justices' Note Book, and Gneist, Self-government, S. 217, 337.

[3] 42 & 43 Vic. c. 49.

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special sessions, in the petty sessional divisions of the county established for this purpose.[1]

Though all the justices are, in principle, competent to act in any part of the county in all matters, it is the custom for each to elect, for the discharge of his petty judicial functions, a particular (sessional) division of the county, and to confine his action in such matters to the division chosen.[2]

II. *Administrative Functions.* The purely administrative functions of the justices of the peace are discharged in the courts of special and quarter sessions.

1. *Special Sessions.* In the courts of special sessions, their functions touch almost all branches of the administration, but may be classed under two heads. In the first place, the appointment of various local officers is either entirely in their hands or at least subject to their control. Thus, by the poor law of Elizabeth,[3] they appoint annually all of the overseers of the poor, with the exception of the *ex officio* overseers, who, it will be remembered, are the church-wardens. It is said, however, that the right of presentation possessed by the vestries of the various parishes has developed practically into a right of election, since the justices almost invariably appoint the persons whose names are first on the list presented to them by the vestries.[4] The justices also appoint the unsalaried constables, and dismiss them from office.[5] The examiners of measures and the surveyors of highways were formerly appointed in the special sessions; but the former officers are now appointed by the county authority, while the latter are elected, or appointed by the highway boards.[6] In the second place, the justices of the peace, in special sessions, have many duties to perform which affect directly the matters of administration rather than the personnel. Thus they have special duties to perform with reference to the highways, such as diverting or closing a road; and they act as a supervisory authority over the entire highway administration.[7] The justices

[1] Wigram, The Justices' Note Book, ch. 2. [2] *Ibid.*, p. 2. [3] 43 Eliz. c. 2.
[4] Gneist, Selfgovernment, S. 345; Chalmers, Local Government, p. 43.
[5] 5 & 6 Vic. c. 109.
[6] See 41 & 42 Vic. c. 49 and c. 77, and 5 & 6 Wm. IV, c. 50.
[7] 25 & 26 Vic. c. 61 and 27 & 28 Vic. c. 101.

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of each petty sessional division must within the last seven days of September hold a court of special sessions for revising and allowing the lists of persons liable to serve on juries within their division.[1] The justices of each petty sessional division must hold four special sessions each year to hear appeals against the poor-rates of the different parishes within the division.[2] The justices, in their courts of special sessions, are further the general licensing authority for all those trades for the pursuit of which the law requires a license. Thus, by 9 George IV, c. 61, there is held in every petty sessional division an annual licensing meeting, at which licenses for the sale of intoxicating drinks are issued. Under the present law[3] such licenses must be confirmed by the confirmation committee of the quarter sessions or by the borough confirmation committee. The sale of gunpowder, also, must be licensed;[4] and so must theatres and the like. In all these cases the licenses are issued by the justices in special sessions.[5]

The above examples indicate the numerous powers exercised by the justices of the peace, in petty and special sessions, relative to the actual administration of the country. The enumeration is by no means exhaustive.

2. *Quarter Sessions.* We have now to examine the administrative functions discharged by the justices of the peace in their courts of quarter sessions. In the English books on the subject these functions are generally grouped under the title of "county business." They are of two general classes: (1) those relating to the personnel of the county service and (2) those relating rather to the matters of administration than to the personnel.

(1) To the county authority belongs the appointment of almost all the salaried officers of the county. Among these are the county treasurer, whom they dismiss from office in their own discretion and whose salary also they may fix as they see

[1] 6 Geo. IV, c. 50.
[2] 6 & 7 Wm. IV, c. 96, sec. 6.
[3] 35 & 36 Vic. c. 94.
[4] 38 & 39 Vic. c. 17.
[5] See Stone's Practice for Justices of the Peace, *etc.*, at Petty and Special Sessions, 9th edition (1882), pp. 476–499.

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fit;[1] the clerk of the peace, who is regularly appointed by the *custos rotulorum*, but may be appointed by the quarter sessions in case the *custos rotulorum* neglects to act;[2] the overseers of the bridges in the county;[3] the inspectors of weights and measures;[4] the chiefs of the salaried constabulary for the county;[5] and the superintendents of the county lunatic asylums.[6] In addition to the appointment and dismissal of the subordinate officers of the county, the quarter sessions has also, in many cases, the right to fix their fees. Among those whose fees are thus determined are the coroner, the justices' clerks, and the unsalaried constables.[7] In most cases, however, the scale of fees must be approved also by the Home Secretary.

(2) As regards the matters of county administration:

(*a*) The quarter sessions have quite an extensive ordinance power. The ordinances issued are, as a rule, supplementary to existing laws. Thus the quarter sessions make by-laws, as they are called, with respect to all highways within any highway area within the county,[8] and regulations for the general conduct of lunatic asylums.[9] In addition to the regulations that the quarter sessions may issue in first instance, they have the power to confirm the by-laws issued by various semi-public corporations: *e.g.*, new savings banks, friendly and loan societies, and improvement commissions.

(*b*) The quarter sessions have general charge of the county finances and property. They have also to provide places for the holding of the courts of the county and lodgings for the travelling justices of the royal courts. Accordingly, they fix the amount of the county taxes, which are tacked upon the poor rate;[10] they issue all orders of payment for county expenses to the county

[1] 43 Eliz. c. 2, sec. 14, c. 3, sec. 7; 55 Geo. III, c. 51, sec. 17.
[2] 37 Henry VIII, c. 1.
[3] 22 Henry VIII, c. 5, sec. 4.
[4] 41 & 42 Vic. c. 49.
[5] 13 & 14 Vic. c. 20, sec. 6; 20 & 21 Vic. c. 2, sec. 2.
[6] 16 & 17 Vic. c. 97.
[7] See 1 Vic. c. 68; 14 & 15 Vic. c. 55, sec. 9–12; 5 & 6 Vic. c. 109, sec. 17; 13 & 14 Vic. c. 20, sec. 2.
[8] 41 & 42 Vic. c. 77, sec. 26.
[9] 16 & 17 Vic. c. 97.
[10] See 8 & 9 Vic. c. 111.

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treasurer;[1] they audit the latter officer's accounts;[2] and they decide as to the repairing or building of shire halls — a power which includes the power to purchase lands and to borrow money and pledge the proceeds of the county rates for its payment.[3]

(*c*) The quarter sessions have the power to issue certain kinds of licenses, though the licensing power as a rule belongs to the petty and special sessions. Among the licenses which must be granted in quarter sessions are those for the keeping of private lunatic asylums,[4] and for slaughter-houses.[5] Furthermore, the new licensing act in regard to the sale of intoxicating liquors requires that the licenses issued by the special sessions be confirmed by a committee of the quarter sessions.

(*d*) The quarter sessions has an extensive supervisory power over the actions of the subordinate local authorities. Thus there is a general right of appeal[6] to quarter sessions from the orders of the justices acting either singly or in petty or special sessions, and from the acts of almost all the subordinate local officers in all the branches of the administration. A very wide appeal is allowed in the matter of local taxes, the court of quarter sessions having power to review questions both of fact and of law. In the hearing of these appeals the court of quarter sessions acts in very much the same way as the administrative courts on the continent of Europe.

Enough has been said to show that the justices of the peace form by far the most important part of the old system of local government. The outline of this system, however, is not complete without some reference to the parish. It will be remembered what position this body held before the reform of the poor law (1834), and before the various changes that have been made during the past one hundred and fifty years in the administration of the highways. Through its vestry, its overseers of

[1] 43 Eliz. c. 2, sec. 14.
[2] *Ibid.*, c. 3, sec. 7.
[3] 7 Geo. IV, c. 63.
[4] 8 & 9 Vic. c. 100.
[5] 7 & 8 Vic. c. 87.
[6] It would be a tedious task to collect all the laws which provide for such an appeal; there are more than a hundred of them. The majority of the laws cited in this paper expressly provide for such an appeal. See also Gneist's classification of this kind of appeals in Selfgovernment, S. 386.

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the poor and its surveyors of highways, the parish exercised no inconsiderable influence in the local administration. But the Poor Law Amendment act reduced the overseers to the position of mere assessors and collectors of the poor rates, and put them very much under the control of the justices of the peace; and the gradual transformation of the highway administration has left the parish and its immediate officers little to do. The parish is now little more than an election and tax district with officers reduced to a shadow of their old importance. It has indeed obtained a new significance as school district; but as school district it has also a new and different organization.

So much, then, remains of the old system of local government. The justices of the peace preserve most of their old police functions, which still have a very wide meaning and affect even those branches of the administration attended to by the local boards; and when united together in the court of quarter sessions they are still the county authority. The county authority is, as it has been for centuries, unrepresentative in character, — in so far at least as the term representative means representation by election, — and most of the justices are still chosen from a single class, that of the large landholders. But this authority, though technically unrepresentative, actually represents the county as well perhaps as any authority could. As against the central government, the independent position of the justices makes them excellent representatives of the local interest. That they are not elected and that they belong for the most part to the landholding class, are facts which naturally make against them in this democratic century; and the increasingly democratic spirit of English politics has led to the introduction into Parliament of many schemes for their abolition as the county authority or for the introduction into their organization, as such county authority, of a certain number of representatives of the rate-payers.[1] None of these plans, as yet, has obtained any considerable

[1] Many of the reform plans proposed may be found in Local Government and Taxation in the United Kingdom, published by the Cobden Club, p. 89.

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support, but the question is one which is mooted at almost every session of Parliament.

The New Boards and the Central Control.

The reasons why this system of local government proved unsatisfactory to the citizens of England after the passage of the Reform bill of 1832 have already been pointed out. One of the chief objections to the old system was that the people were taxed for the poor rates without any elective representation. It was only natural that the main feature of the reform which was introduced by the Poor Law Amendment act of 1834 should be provision for elective boards in those branches of the administration in which the heaviest taxes were levied. All the other changes that were made — *e.g.* the association of neighboring parishes into poor-law "unions"[1] and the introduction of a strong central control — were due to considerations of administrative expediency. The main change was the provision for elected assemblies.

Since the passage of the Poor Law Amendment act, the principle of representation has been introduced into three other branches of the local administration: *viz.*, the sanitary administration, public instruction and the administration of the highways. The members of the elective boards are voted for by the rate-payers, who have, as a general thing, the right to a plural vote. The number of votes varies with the amount of rates paid and runs as high as twelve votes in some cases, when the voter votes both as occupier and as owner. This is the case in the vote for guardians of the poor.[2] In one case, — *viz.*, in the election of members of the school-board — provision is made for minority representation. Each voter has as many votes as there are members to be elected, and may distribute them among the candidates as he sees fit. This rule was adopted in order to secure the repre-

[1] The union of parishes had already been tried in the preceding century with more or less success. See Gilbert act, 1782.

[2] See Poor Law Amendment act, 1834.

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sentation of ecclesiastical minorities.[1] In the case of the board of poor-law guardians, it must be kept in mind that the justices residing within the limits of the union are *ex officio* guardians. But they must never comprise more than a third of the entire membership. Hardly any of the later laws provide for these *ex officio* members, and indeed their connection with the board of guardians is not of much importance. They can never wield more than a third of the power and, as has been said, they do not as a rule attend the meetings of the board.

These boards are not always distinct as to personnel; or, rather, there are not as many separate boards as there are subjects of administration. The rural sanitary districts are coincident with the poor-law unions, and the board of guardians in these districts is the sanitary authority. In many cases the highway districts are also coincident with the unions; and in these cases the same board directs all three branches of local government. Such a board, composed of members who serve without pay, does not attempt to attend to the details of administration. It simply administers the finances of the district. The details of administration are delegated to salaried officers. It is the custom of the guardians, permitted by the law, to appoint, for the poor-law administration, "union" relieving and medical officers as well as workhouse masters, chaplains, and schoolmasters; for the sanitary administration, a medical health officer and an inspector of nuisances, together with clerks, a surveyor and a treasurer, all of whom are paid; and for the highways, in case the board of guardians is the highway authority,[2] a treasurer, a clerk, and a surveyor and assistant surveyors.

All of these officers, together with their superiors, the elected boards, are under the strictest control of the new department of

[1] See Elementary Education act, 1870.

[2] The law in regard to this matter of highways, it should be noticed, is still not at all uniform. In some of the parishes of England it is the vestry of the parish with the old surveyor of highways who at the present time attend to this matter, while in others several parishes have been formed into highway districts with a highway board, which in many cases is the board of guardians. See Chalmers, Local Government, pp. 133–6.

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the interior at London, the Local Government board, or of the Education department of the Privy Council. The powers of control which these two bodies may exercise are very similar. It is least in the matter of highways, and seems to be confined to the scrutiny and auditing of accounts.[1] In the poor-law administration, the central control includes the sole power of discharging the subordinate officers, the power of examining all the accounts of the guardians and their subordinates and disallowing improper items, and the power of issuing general rules for the guidance of the guardians. In the sanitary administration and in the matter of elementary education, the central authority possesses large powers of compelling the local authorities to introduce the needful institutions for preserving the public health and for assuring educational facilities. A recent writer says:

> Thus, if a local authority makes any default in any matter relating to the sewering or water supply of the district, the [Local Government] board, after due inquiry, may order the local authority to execute the necessary works within a specified time. If the order is not obeyed, it may either be enforced by a writ of *mandamus*, or the board may appoint persons to do the work and recover the expenses from the local authority.[2]

Again, the same author says, in regard to the school administration:

> If the school board make default [*i.e.* in the provision of the necessary school accommodations], the Education department may, after due notice, appoint a committee to act in their place until the requirements of the department have been complied with.[3]

And again:

> If a school-attendance committee[4] make default in the performance of its duties, the Education department may appoint persons for a speci-

[1] We have already seen that the justices of the peace, both in quarter sessions and special sessions, have a considerable control over the opening and discontinuing of roads and over cognate matters.

[2] Chalmers, Local Government, p. 121. Public Health act, 1875.

[3] *Ibid.*, p. 129.

[4] It should be said here, by way of explanation, that if in any place there is no school-board, — which may often be the case if there is sufficient school accommoda-

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fied period, not exceeding two years, to perform the duty of the committee. The persons so appointed may be remunerated, and the expense incurred may be recovered from the town council or guardians as the case may be.[1]

From this hasty sketch of the new system of government introduced in local affairs as a result of the great reforms since and including the Poor Law Amendment act of 1834, it will be seen how much the time-honored system of English local government has been modified. Obligatory service has been replaced by voluntaryism; appointed by elected officers; unpaid by salaried service; local autonomy by administrative control; enumeration by law of the duties of local officers by central instructions. Indeed the new system presents a centralization such as is not excelled in any of the countries of Europe.

The Municipalities.

In conclusion a word or two must be said in regard to the position of the English municipalities. The municipalities are of two classes: the municipal boroughs and the local government districts. Of the latter class, the most important are the urban sanitary districts. The law governing the former class is the Municipal Corporations act of 1882. Under this law, the town authority is the municipal or borough council. This is elected by the burgesses of the borough, the suffrage being subject to a property qualification. In the local government districts the local authority is the board of health or, in those districts not governed by the general act but rejoicing in special charters, a board of improvement commissioners. These boards are elected on somewhat the same principles as the borough council. The main purpose of the existence of a municipality is the care of its own peculiar concerns and it has little to do with the general administration of the country.

tion in the place without the formation of any board-schools,—a committee of the board of guardians acts in place of the school-board in enforcing the provisions of the act relative to the compulsory attendance at school of the children within the district.

[1] Chalmers, Local Government, p. 131. Elementary Education acts.

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Thus in every borough we find the parish existing with almost the same duties and the same officers as in the rural localities, and the law in regard to public charities is about the same for the municipalities as for the country, the only important exception being the metropolis — which is, it should be noted, an exception to almost all rules. The guardians have the same jurisdiction in the municipalities as in the rural localities. This general statement, however, requires qualification: various acts, *e.g.* the Public Health act and the Highway acts, make the town council and the local board the local authority for sanitary and highway purposes. In these matters of general administration the central authorities have about the same rights of supervision over the municipal as over the rural authorities. The justices — when there are justices — have about the same jurisdiction in the municipalities as in the country at large, with the exception of those boroughs which do not contribute to the county rate. In the municipalities, the justices have been replaced — and may be replaced in all localities which have an aggregation of inhabitants of over twenty-five thousand — by stipendiary magistrates. These officers have about the same functions to discharge as the country justices, with the exception of attending and acting in the courts of special and quarter sessions, and they receive a salary, which, it will be remembered, is not the case with the country justices. In their police courts these stipendiary magistrates, even when sitting alone, may do any act and exercise any jurisdiction which may be done or exercised by two or more ordinary justices.[1] In the urban sanitary districts, in addition to the simple powers of sanitary administration, the local boards have, by the Public Health acts, very large powers of local government, in fact about the same as those of the boroughs, with perhaps the exception of the control of the police force, which in these districts is a part of the county police and is under the control of the justices.

Though the principle of enumerating by law the powers of the municipalities has been adopted in England, as in this coun-

[1] Wigram, Justices' Note Book, p. 6.

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try; and though the rule that no municipality may do anything for which it has not received special authority by law has the same force as here; still the laws which have been passed on this subject grant very much larger powers to the English municipalities than are commonly conferred upon the municipalities in this country. Nearly all the municipalities may establish and run gas works, and very many may erect and operate at their own risk artisans' dwellings and lodging houses,[1] subject simply to the administrative control of the central executive authorities at London in regard to the amount of money to be expended and debt to be contracted.

Such is the condition of English local government at the present time. No attempt has been made to secure any symmetry in its [illegible] regularity in its action. As new needs have made themselves felt, new authorities have been created for their satisfaction; so that in some distr[illegible] there are as many as thirty-five authorities, some of which are elected, some of which are appointed, and many of which have the power of levying taxes.[2] There has been no attempt to make the areas of government coincide, save that the rural parish has been taken as the school district and that the union has been formed out of so many parishes. Otherwise the boundaries of the various districts overlap one another on every side. A parish may be in two counties and a borough in two unions. The elections of the various local authorities do not all take place at the same time, and the methods of voting for different officers are frequently different. No attempt is made to have any general budget drawn up, showing the expenses of a given locality. The result is, of course, great extravagance and want of knowledge of local conditions.

What reforms are necessary it is difficult to indicate. It certainly seems useless to attempt particular improvements in the present complex system. A reorganization of the whole machinery of local government seems to be required. For such a

[1] See Artisans' Lodging and Dwelling Houses acts.

[2] See Chalmers, Local Government, pp. 17, 18.

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reorganization the new system adopted by Prussia might well serve as a model. The new Prussian system combines symmetry of form with ease of action; it preserves sufficient central control to insure harmony and uniformity, and yet grants large powers of local autonomy; and, while it makes provision for professional and salaried service, it is not based on voluntaryism but imposes the performance of official duties on vast numbers of private citizens. Some such system of local government England must soon adopt; else her people, from lack of participation in administrative duties, will lose much of that political capacity which has made her famous self-government possible, and the conduct of all public affairs will fall into the hands of a centralized bureaucracy.

FRANK J. GOODNOW.

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INDIA'S UNADJUSTED TRADE BALANCE:

ITS EFFECTS ON THE INDUSTRIAL AND COMMERCIAL CONDITION OF THE PEOPLE.

I.

THE object of these notes is not controversial, but mainly to state and set in order the leading statistics of British Indian sea-borne trade, to call attention to the remarkable anomaly displayed in the balance of India's foreign commerce and to refer to some results of the anomaly. In doing this it will be highly convenient and peculiarly suitable to take as text or motive certain propositions comprised in the very comprehensive paper on *The Use of Import and Export Statistics*, first read before the Royal Statistical Society of Great Britain by Mr. Robert Giffen, and subsequently published in a collected volume of his *Essays*.

In opening the third section of that paper the writer says: "I propose to discuss the application of the import and export statistics to the problem of the balance of trade and the connected problem of the balance of indebtedness of a country." As the relation between the values of the imports and exports of India is quite unusual and abnormal, it is desirable to put aside for the present that conventional and market-place phrase "the balance of trade." The balance of the trading world's indebtedness to India is commercial and industrial; and we shall find that it is a balance never adjusted, an indebtedness never repaid to India.

One of the first broad facts noted by Mr. Giffen in his paper is that "an excess of imports is a very common thing." He then shows that comparing the aggregate imports and exports of the world — the year used for his comparison being 1878 for some countries and 1879 for others — the aggregate excess of imports was 162 million sterling. Carrying the comparison

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to a wider range and quoting statistics compiled by Dr. von Neumann-Spallart, he shows that, in the seven years ending 1879, the aggregate excess of import valuations over export values was 1229 millions, or an average of 177 per annum; but as the German statist's figures do not appear to include treasure, it may be noted, in passing, that they do not show complete values. Thereupon Mr. Giffen records the general conclusion that "an excess of imports in the aggregate trade of the world is a permanent fact." But while this is the total result shown, he duly enters the figures of variation, and points out that while Europe, with the United Kingdom, exhibits an excess of imports amounting to 254 millions, the rest of the world shows an excess of 92 millions in exports. This leads up to the special anomaly which it is my purpose to set forth. In Mr. Giffen's statistics for Asia, the excess of India's exports over her imports for the year dealt with (1878–9) stands at the striking figure of £20,063,000. There is only one country that at all approaches this position in the table, and that is the United States. The excess of exports from this country is entered as £56,118,000. This, as will be shown, is a very exceptional instance; and as the total exports from India are little more than two-fifths of the value of those from the States, the comparative excess of exports in the latter case is very little more than India's excess. But this is a mere superficial and partial comparison between America's and India's excess of exports.

Mr. Giffen's immediate purpose was to expose popular fallacies regarding the "fair-" versus free-trade controversy, with which here we have nothing to do. Hence it was sufficient for him to deal with the six years ending 1881, which show an average excess of exports by America of 37 millions per annum. For the purpose of any substantial comparison between these or any two countries, it would be one of those elementary mistakes which Mr. Giffen exposes, were we to deal with such short periods. And for his own purpose the remark may be admitted, parenthetically, that his labour would have been lightened by taking the whole twenty-two years of America's trade figures given in his own tables. These at once disclose

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that America's 37 millions annual excess of exports during the six years under notice shrink up to an annual average of only £5,535,270 for the twenty-two years' period of the whole table (1860–81 inclusive). We shall presently see how the figures for India compare within the same period. But this table (VIII) bears on its very face striking illustrations of the "disturbing influence of great economic events" referred to by Mr. Giffen (page 194). For do we not see writ large, in the excess of United States imports from 1861 to 1869, the effect of absorption of loan funds and war material from Europe under the strain of the great civil conflict; and again, in the abnormal excess of exports from 1874 to 1881, the repayment of special obligations, or, as Mr. A. J. Wilson puts it, "the redeeming of war-debts with great rapidity"?

As, in Mr. Giffen's paper and tables, the position of France is also shown, it will be convenient to state the totals here, in passing, by way of contrast. It appears, from the figures of the twenty years 1860 to 1880, that the imports of France exceeded her exports by nearly 299 millions, or exactly £14,218,762 per annum. This seems to bring us back again to the broad general proposition quoted above, that "an excess of imports in the aggregate trade of the world is a permanent fact;" and to its converse, that an excess of exports in any particular country is an anomaly and reveals some abnormal circumstance.

Let us take, then, the same period of India's foreign trade transactions as that covered by the statistics of excess exports of the United States. The figures of the following table are drawn from the *Statistical Abstract relating to British India*,[1] and — what is of great moment in the review of our whole subject — these figures discriminate between merchandise and treasure. But it must be remembered that silver, of which by far the larger part of India's bullion imports consist, is as much a commodity as are the iron and piece-goods that come under the head of merchandise. It would be as great an error to exclude silver from the import figures of India as to exclude gold when computing the exports of Australia.

[1] Sixteenth number (1882).

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SEA-BORNE TRADE OF BRITISH INDIA IN THE FINANCIAL YEARS 1860–81.

The amount of the Exports and the Imports during each of the undermentioned years is in millions sterling and decimals of millions.

		Exports.			Imports.		
		Merchandise.	*Treasure.*	*Total.*	*Merchandise.*	*Treasure.*	*Total.*
		£	£	£	£	£	£
1860	April 30.	27.96	.93	28.89	24.26	16.36	40.62
1861		32.97	1.12	34.09	23.49	10.68	34.17
1862		36.32	.68	37.00	22.32	14.95	37.27
1863		47.86	1.11	48.97	22.63	20.51	43.14
1864		65.63	1.27	66.90	27.15	22.96	50.11
1865		68.03	1.44	69.47	28.15	21.36	49.51
1866		65.49	2.17	67.66	29.60	26.56	56.16
1867 (11 ms.)	March 31.	41.86	2.43	44.29	29.04	13.24	42.28
1868		50.87	1.57	52.44	35.71	11.77	47.48
1869		53.06	1.40	54.46	35.99	15.16	51.15
1870		52.47	1.04	53.51	32.93	13.95	46.88
1871		55.34	2.22	57.56	34.47	5.44	39.91
1872		63.21	1.48	64.69	32.09	11.57	43.66
1873		55.25	1.30	56.55	31.87	4.56	36.43
1874		55.00	1.91	56.91	33.82	5.79	39.61
1875		56.36	1.62	57.98	36.22	8.14	44.36
1876		58.09	2.20	60.29	38.89	5.30	44.19
1877		61.01	4.03	65.04	37.44	11.44	48.88
1878		65.22	2.21	67.43	41.47	17.35	58.82
1879		60.94	3.98	64.92	37.80	7.06	44.86
1880		67.21	2.04	69.25	41.17	11.66	52.83
1881		74.54	1.44	75.98	53.09	8.99	62.08
		1214.69	39.59	1254.28	729.60	284.80	1014.40

£1,254,280,000 − £1,014,400,000 = £239,880,000.

£239,880,000 ÷ 22 = £10,903,636 per annum.

Here then we have, on the face of the official trade returns, the broad fact that in the twenty-two years under notice an aggregate amount of nearly 240 millions' worth was sent out of India for which no tangible material return can be traced — a fact to which there is no parallel in the commercial statistics of the world.

The question arises: Are there any additions or deductions

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to be made on the import or the export side of the account that will affect the amount of the deficit?[1] There are; but these, in effect, go to swell the excess of the exports.

In the first place, a formal adjustment is obviously required; for while the figure of imports into India necessarily includes the cost of freight and the profits of the senders of the goods, these large items are not included in the exports as valued at the port of departure. In Mr. Giffen's paper, great pains are taken to compute the amount of the required correction; but in his method of dealing with the subject, the amount is put as a deduction from the imports. It seems to me that the more direct method is preferable, that of estimating what addition to the local figure of exports is required in order to place the valuation of them on a level with that of the imports. Mr. Giffen puts "the cost of conveyance" as the chief factor to be considered; but — apart from purely financial transactions presently to be considered — it is manifest that, besides freight, the profits on the exports at their destination should be credited to the exporting country in order to place them on the same level of valuation with the imports. From various considerations — the more obvious one being the trade profits actually gained by England and other independent countries, as shown partly by their excess of imports over exports — it would be tolerably safe to add, for freight and profits (including interest), 15 per cent to the valuation of Indian exports when shipped.[2] This would

[1] A prior query may be raised: Can the valuation of Indian exports and imports be relied on as correct? To this I would reply: (1) That in the earlier portion of the period there were both under- and over-valuations; these were pointed out by Mr. Robert Knight, myself, and others; but (2) the *under*-valuations of the exports were the preponderating figure; and, (3) Mr. J. S. O'Conor, the official reviewer of the trade returns, considers that in late years the valuations have been fairly accurate and that on the whole the totals are substantially correct.

[2] I am aware it is sometimes claimed that, as India should pay for the cost of carrying her goods away (inward freight being already necessarily included in the figures of import value), therefore cost of outward freight is held to account for a considerable portion of the excess of her exports. One writer, referring to the figures of this period, makes an estimate of 10 per cent for freight and private remittance to England (two very different factors) and treats these items as *deductions* from India's exports! It is not needful for our present purpose to work out this branch of the question, and certainly that method does not accord with Mr. Giffen's view of it. He

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make the excess value of Indian exports during the twenty-two years, 1860–1881, 428 millions.[1] To obviate all doubt, let ten per cent be only added; that will leave the deficit 365 millions, or nearly 17 millions per annum.

But there is another more definite addition required to India's unsettled balance, namely, the public debt incurred abroad (almost all in England) during the period. It is difficult without special official aid to state the exact sum of this factor. But it is plain that during the period a total of 83¾ millions was added to the debt of India. Of this amount, one account before us gives 27½ millions as incurred in England; to which may properly be added, as affecting the imports of 1860, some portion of over eight millions loan, taken up in England in 1858–59, making say 30 millions; though from the *Statistical Abstract*, it would appear that 32⅓ millions were added to the debt in England during the years 1872 to 1881. Then it must be remembered that, of the loans issued in India, a large proportion was supplied by English bankers and investors; so that, of the total 83 millions incurred during our twenty-two years, quite 50 millions have been supplied from Europe.[2] Again, in the same period there has been a large addition to the railway and public works debt of India. The increase of railway debt in the period

takes great care (section 4) to estimate the share due to England for the "service of conveyance." On his method this plainly requires an *addition* to be made to the Indian export values: and that is the course that has long been taken by myself and others in dealing with Indian trade statistics. It is true that, according to the formula given by Mr. Giffen (foot-note p. 207), "A non-carrying nation . . . ought to show in its accounts an equality between imports at the place of arrival and exports at the place of departure." India is exactly an instance of "a non-carrying nation;" but, as pointed out in the text, such formal equality in the accounts between imports and exports is *per se* impracticable.

[1] Fifteen per cent of 1,254,280,000 = 188,142,000. 188,142,000 + 239,880,000 = 428,022,000.

[2] A direct confirmation of this estimate of Indian loan funds advanced by English investors or transferred to Europe in the period, especially as regards the latter portion of it (1873–1881), is afforded by the official returns, which show nine millions' worth of "rupee paper" as transferred from India to England in those seven years. This sum would go back through the imports into India, either as specie or merchandise, and therefore must be deducted from the figure of imports, as not constituting any commercial recompense for exports; or it should be added to exports, as additional debt due to India.

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was close on 47 millions. Most of this amount passed through the import valuations in the shape of railway material, *etc.;* but we need not deduct this from the import totals, or add the same to the balance of exports, since it exists (most of it) in the productive form of railway lines. Thus the account of India's commercial transactions with the outer world for the period we have taken will stand thus:

Exports of British India, 1860–81 *inclusive.*		
Merchandise and treasure		£1,254,280,000
Add ten per cent as representing freight and trade profits claimable		125,430,000
Add for public debt taken up in Europe and local debt transferred from India		50,000,000
		£1,429,710,000
Imports, same period.		
Merchandise	£729,600,000	
Treasure	284,800,000	£1,014,400,000
India's commercial and industrial deficit during the twenty-two years		£415,310,000
Or, per annum		£18,877,727

It is appropriate to notice that both the earlier and later portions of the period under notice were peculiarly affected by "the disturbing influence of great economic events." For at least two of the earlier years, the demands of the Home government on the Indian treasuries were almost suspended, debt being incurred instead; while, during the first five or six years, the exceptional value given to Indian produce by the American war enhanced the figure of the exports more rapidly than that of imports. On the other hand, the large influx of railway capital swelled the figure of imports, especially of bullion, this for the time reducing and almost suspending India's chronic trade deficit. Again, during the later years, the cessation of railway payments in, and the heavy enhancements of "Home charges" paid out, have swelled the deficit.

It may be well to look at a more recent period of Indian trade returns, for this will bring us more directly face to face

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with the great fact of India's chronic commercial deficit. Such returns are given, in very compendious form, in a recent official review [1] of which Mr. J. S. O'Conor is the editor. He sets out the excess of exports (taking treasure into account on both sides) in the ten years, 1873–83. The list begins with 19⅖ crores [2] of rupees in 1873–4; but the years vary — owing to causes well known to those who are familiar with the subject — from 10⅗ in 1877–8 to nearly 21 crores in 1882–3. The total excess of exports in the ten years is shown to be 182,16,92,440 rupees; which may be rendered in sterling either at the conventional ten rupees to the pound, which gives £182,169,244, or, if *The Economist's* rate (of twelve rupees) be applied, the deficit shown is the sufficiently astounding sum of £151,807,700, or over 15 millions sterling per annum, for which India has no material return — a balance of trade to which it is bitter irony to apply the conventional phrase "in her favor," for it is a balance that is never adjusted. Be it noted that these 15 millions represent the minimum, without the adjusting enhancements of the export figures which are really required, as already shown; and, therefore, that 15 millions per annum represent a fact beyond all question or cavil.

As still later figures are now available, it may be well to add them. They cover the four years ending with March, 1887, and are as follows:

EXPORTS FROM BRITISH INDIA.

Years ending March 31st.	*Merchandise.*	*Treasure.*	*Total.*
	Rs.	*Rs.*	*Rs.*
1883–4	88,17,60,902	1,01,03,674	89,18,64,576
1884–5	83,25,52,921	1,97,06,300	85,22,59,221
1885–6	83,86,11,693	1,10,82,310	84,96,94,003
1886–7	88,48,10,354	1,72,04,261	90,20,14,615
			349,58,32,415

[1] Review of the Trade of India, 1885–6.

[2] The Indian numeration is —

1,00,000, *i.e.* one lakh = 100,000.

1,00,00,000, *i.e.* one crore = one hundred lakhs = 10,000,000.

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IMPORTS INTO BRITISH INDIA.

Years ending March 31st.	*Merchandise.*	*Treasure.*	*Total.*
	Rs.	*Rs.*	*Rs.*
1883–4	55,27,93,484	12,87,79,663	68,15,73,117
1884–5	55,70,30,718	13,88,81,918	69,59,12,696
1885–6	55,63,19,552	15,46,70,808	71,11,90,360
1886–7	61,81,19,608	11,04,83,224	72,86,02,832
			281,72,79,005

Excess value of exports for the four years = *Rs.* 67,85,53,410 [1]
" " " " per annum = *Rs.* 16,96,38,352

At the conventional rate of *Rs.* 10 to the £ this = £16,963,835
" *The Economist's* " " *Rs.* 12 " " " " = £14,136,529
" the actual (*i.e.* 1*s.* 5*d.*) " " *Rs.* 14 " " " " = £12,117,025
} per annum.

In proceeding to point out of what this unredressed balance consists, it may be assumed that this part of my subject is so far a matter of common knowledge that it need not be dwelt upon at any length. During the period of twenty-two years examined above, the sums received by the Secretary of State, for his bills drawn on the Indian treasuries, present an aggregate of rather over 207 millions sterling (about 350 crores of rupees). This aggregate would have been 30 millions more, had not Indian loans to that extent been taken up in England. Moreover the greater part of the 47 millions of railway capital subscribed in the period, being paid into the Secretary of State's account in London, kept down his drafts by that amount; but, as we have said, most of that railway capital is represented in the imports of the period, and so cannot be counted again as representing part of the deficit. For the rest of the 415 millions, — an amount nearly as much again as the sum of the Council drafts, — explanation must be sought in the remittances of the Indian government's (European) servants, civil and military, and of soldiers; in the profits of merchants and

[1] In this period over ten millions sterling has been added to public debt borrowed on England; and that sum may be regarded as, in effect, an addition to the excess of exports as shown above.

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other European traders (other than freight on exports); in profits on factories and other industrial enterprises; and in the numberless ways in which Great Britain, powerful in its command of capital, inevitably lays its dependency, weak in its impecuniosity, under contribution.

Though the topic does not strictly pertain to the question before us, it is pertinent here to remind Englishmen that by far the greater part of India's deficit comes to swell the surplus of the United Kingdom's annual profits and to sustain those accumulations to which British statisticians often point with excusable pride. Let any one accustomed to trace the streams of profit that flow towards the seats of capital and the centre of political power, consider fully and fairly the vast balances shown in the preceding tables, — 400 millions in the twenty-two years and 150 to 180 in the ten years, — and some just realization, some clearer conception of the value of India to England may thereby be obtained.

II.

And now, for any student of social statistics, the practical question that arises out of the facts stated is: What effect is produced on the condition of the people of India by this excess of exports, this balance of trade that is never settled, this continued drain of resources never compensated from without? The force of this question becomes much accentuated when we take into account the low industrial efficiency of India as compared with Europe or the United States, where we find highly organized labor and marvellous mechanical forces. Moreover, the deficiencies of India in the materials of modern productive power contrast strongly with the enormous stores of coal and iron possessed by Great Britain and the United States, the latter having, also, vast available resources of virgin soil.

It must be remarked that, while a considerable portion of India's unrecompensed exports is the result of voluntary payment of interest on capital and for skilled management, the major portion has to be yielded up under the compulsion of

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administrative sway. This is represented in the 14 to 18 millions' worth of the Secretary of State's annual drafts, and these are cashed directly from the public treasuries of India. Here, in order to bring out the special economic, pecuniary, and industrial effects on the people of India, following from the unrequited outlay of such a large portion of their annual resources, it may be permitted to quote at some length what was said by one of the earliest writers on this problem of social statics, (a writer now little known,) Colonel Sir George Wingate, R. E.:

Taxes spent in the country from which they are raised are totally different in their effect from taxes raised in one country and spent in another. In the former case, the taxes collected from the population at large are paid away to the portion of the population engaged in the service of government, through whose expenditure they are again returned to the industrious classes. They occasion a different distribution, but no loss of national income (capital). And hence it is, that in countries advanced in civilization, in which the productive powers of men are augmented by mechanical contrivances and a judicious use of the powers of nature, an enormous taxation may be realized with singularly little pressure upon the community. But the case is wholly different when the taxes are not spent in the country from which they are raised. In this case, they constitute no mere transfer of a portion of the national income from one set of citizens to another, but an absolute loss and extinction of the whole amount withdrawn from the taxed country. As regards its effects on national production, the whole amount might as well be thrown into the sea, as transferred to another country, for no portion of it will return from the latter to the taxed country in any shape whatever. Such is the nature of the tribute we have so long exacted from India. And the burden of a tribute is aggravated in proportion as the tributary country is backward in civilization and possesses few mechanical and scientific aids for augmenting its productive power; for the net income of such a country, or the surplus of the gross produce of the nation's industry, over and above the quantity required to replace the amount consumed in production, must necessarily be small. A country in the high state of industrial development of our own could probably pay in tribute one-half of its whole taxation more easily than India could pay one-tenth, which was not far from the proportion that the tribute bore to the gross revenues before the outbreak of the Mutiny.... Let the reader endeavour to

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picture to himself what the present condition of India would have been, had the eighty or ninety millions of Indian taxes, which have been transferred to this country in the present century, been spent in India upon reproductive public works, calculated to augment the producing powers of that country. India would long ago have been penetrated in every direction by roads, canals, and railroads. Agricultural produce would, by means of the facilities of transit thus afforded, have been drawn from the remotest parts of the interior to the seaboard, for export to foreign countries; and those regions which now cannot import, because they cannot export, would have become consumers of foreign commodities in exchange for the produce thus sent away. It is probably a poor and inadequate conception to suppose that the net surplus of Indian industry beyond the cost of production, as distinguished from the gross production, would by these means have been doubled or trebled. And as this net surplus forms a fund by means of which a country obtains its imports of foreign commodities, it is not unreasonable to infer that the exports and imports of India would have been double or treble what they are now.[1]

The argument to-day is far stronger than when the above lines were written. Let the reader consider what the fivefold amount drawn away in later years would have done in the form of productive public works. The only qualification, if such it can be considered, of Col. Wingate's discouraging statement of the case is that, since the period at which he wrote, certain special "mechanical and scientific aids for augmenting its productive power" have, in spite of the increase of the annual drain, been provided for India, in the railways, irrigation works — these last to a very moderate extent, — some few cotton factories, and the tea and coffee industries; but, as regards the mass of its agricultural population, the situation is unchanged.

One of the most far-reaching and most cramping effects of the large increase in the uncompensated exports of late years — which mainly represent the increased pressure of the Home charges — is the restriction of the imports of silver into India, as compared with the increase in population and the largely extended commercial transactions. This condition has been more obvious since the cessation of the large payments on

[1] Wingate, Our Financial Relations with India (1859).

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guaranteed railway accounts, which fell off and almost ceased about 1872–3. Since then, as pointed out already in 1876 by Mr. Goschen's committee, the increased volume of the Secretary of State's drafts, by superseding silver, has largely reduced the imports of bullion into India. The following table, compiled from official figures, exhibits this:

MOVEMENTS OF TREASURE INTO AND OUT OF INDIA.

1863 TO 1872 INCLUSIVE.		1873 TO 1882 INCLUSIVE.	
Imports.	*Exports.*	*Imports.*	*Exports.*
£	£	£	£
20.51	1.11	4.56	1.30
22.96	1.27	5.79	1.91
21.36	1.44	8.14	1.62
26.56	2.17	5.30	2.20
13.24	2.43	11.44	4.03
11.77	1.57	17.35	2.21
15.16	1.40	7.06	3.98
13.95	1.04	11.66	2.04
5.44	2.22	8.99	1.44
11.57	1.48	11.32	1.10
162.52	16.13	91.71	21.83
162.52		91.71	
16.13		21.83	
£146,390,000 Net Imports.		£69,880,000 Net Imports.	

This table shows an excess import of treasure of £76,510,000 in the earlier period over the later period, or say a diminution of nearly half in the later period.

The effects of an inadequate currency in depressing prices and checking industry are familiar enough to publicists; but the influence of this adverse condition, as it applies to the circumstances of India, will be more fully appreciated by the study of a remarkable passage in J. S. Mill's *Political Economy* — the concluding portion of his chapter on the "Distribution of the Precious Metals."[1]

[1] "Before closing this discussion, it is fitting to point out in what manner and degree the preceding conclusions are affected by the existence of international pay-

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The late Mr. Bagehot, also, though he at first treated too much in the conventional fashion the remarkable phenomenon of the supersession or large reduction of silver imports into India by reason of the increase of the Secretary of State's demands, afterwards, in two special articles in October, 1876,[1]

ments not originating in commerce, and for which no equivalent in either money or commodities is expected or received; such as a tribute, or remittances of rent to absentee landlords or of interest to foreign creditors, or a government expenditure abroad, such as England incurs in the management of some of her colonial dependencies.

"To begin with the case of barter. The supposed annual remittances being made in commodities, and being exports for which there is to be no return, it is no longer requisite that the imports and exports should pay for one another: on the contrary, there must be an annual excess of exports over imports, equal to the value of the remittance. If, before the country became liable to the annual payment, foreign commerce was in its natural state of equilibrium, it will now be necessary for the purpose of effecting the remittances, that foreign countries should be induced to take a greater quantity of exports than before: which can only be done by offering those exports on cheaper terms, or in other words, by paying dearer for foreign commodities. The international values will so adjust themselves that either by greater exports, or smaller imports, or both, the requisite excess on the side of exports will be brought about; and this excess will become the permanent state. The result is, that a country which makes regular payments to foreign countries, besides losing what it pays, loses also something more, by the less advantageous terms on which it is forced to exchange its productions for foreign commodities.

"The same results follow on the supposition of money. Commerce being supposed to be in a state of equilibrium when the obligatory remittances begin, the first remittance is necessarily made in money. This lowers prices in the remitting country, and raises them in the receiving. The natural effect is that more commodities are exported than before, and fewer imported, and that, on the score of commerce alone, a balance of money will be constantly due from the receiving to the paying country. When the debt thus annually due to the tributary country becomes equal to the annual tribute or other regular payment due from it, no further transmission of money takes place; the equilibrium of exports and imports will no longer exist, but that of payments will; the exchange will be at par, the two debts will be set off against one another, and the tribute or remittance will be virtually paid in goods. The result to the interests of the two countries will be as already pointed out: the paying country will give a higher price for all that it buys from the receiving country, while the latter, besides receiving the tribute, obtains the exportable produce of the tributary country at a lower price." J. S. Mill, Principles of Political Economy, book iii, ch. xxi, § 4.

This has always seemed to me one of the most remarkable instances of J. S. Mill's synthetical reasoning. The circumstances affecting India which are described in the present paper had, at the time Mill wrote, scarcely arisen; the yearly "tribute" from India was a trifle compared with what it has since become; but the present effect on prices and industry in India corresponds precisely to his forecast.

[1] Articles on the Depreciation of Silver, *etc.*, first printed in *The Economist*, and afterwards reprinted. See reprint, pp. 84–9.

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traced out the consequent restriction of the currency in India and the benumbing influence on prices, profits, and industry.

To popular apprehension the large amounts of specie which still flow into India, in spite of the artificial impediment caused by Council bills, seem inconsistent with the complaint of inadequate currency. But this arises from not considering the figures carefully enough. Mr. O'Conor shows, for the five years 1879–83, a net import of bullion into India of 428,866,627 rupees. Taking the population at 250 millions (for the native states must here be included), that shows only *Rs.* 1·733 per head of the population for the five years, which is only 0·34 (about 5½ *d.*) per head per annum: and as a considerable portion of the treasure was gold, this small figure is more than would be felt in the currency.

On the surface and at first sight this peculiar check to India's industrial progress is not apparent. It is, indeed, sometimes eagerly contended that, since the fall in the exchange value of the rupee, buyers for export have been able to offer more rupees to the producer for his crops. That may be so in localities readily accessible by railway from the great ports; but to how small a part of the vast peninsula does the condition apply? And *whence* are these rupees obtained? Why, from the government treasuries; which in turn obtain the rupees mainly from the cultivators themselves, who, having to provide the rupees at certain fixed dates, must sell their crops at the local price they can secure immediately the produce is ready. But as prices are ruled by this condition of a restricted currency, no rise in price can be secured, industry receives no stimulus, and no accumulation is possible.

On the surface of things there is also abundant evidence, not only of the impecuniosity of India, but of the downright poverty and chronic privations of its people. It is evident that, notwithstanding the very low standard of subsistence to which the masses are accustomed, even that poor minimum is not attained. Two such different authorities as the late Lord Lawrence, and Dr. (now Sir) William Hunter, the chief collector and collator of Indian statistics, agree in the statement

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that tens of millions of people go through life without ever being adequately fed. On the mere apprehension of deficient harvest, relief works have to be held ready in order to avert disease and mortality by starvation. This normal condition of poverty has received irresistible confirmation by the destruction of life by famine to the extent of sixteen millions since 1865. There is no need to enlarge on these painful facts.[1]

It may be asked what remedial measures are proposed. The object of this paper, as was stated at the outset, is not to suggest remedies, but to draw attention to the broad fact that whereas, as is shown by Mr. Giffen, under normal conditions the import values of a country largely exceed its export values, the reverse of this condition obtains in the case of British India. If I am to suggest any methods of modifying the anomaly, I disclaim any wish to raise political questions. I do not go so far as to press for adoption of the measures of direct redress proposed by the clear-headed Wingate, which go to the root of the matter.[2] There is a partial though practical

[1] The evidence regarding them is recorded in the Report of the Famine commission (1880); and in a remarkable treatise by Mr. Dadabhai Naoroji of Bombay, on The Condition of India, part 3, vol. xiv, of the *East India Association Journal.* In this latter publication, which, besides abundant statistics, comprises certain special correspondence with the India office, the whole subject of the material condition of the Indian population is exhaustively examined.

[2] This is what Sir George (then Major) Wingate said, writing in 1859: "It would be true wisdom, then, to provide for the future payment of such of the Home charges of the Indian Government as really form tribute, out of the Imperial Exchequer. These charges would probably be found to be the dividends on [old] East India Stock [those have since been capitalized at double their nominal amount and *debited* to the Indian finance account]; interest on Home debt; the salaries of officers and establishment and cost of buildings connected with the Home department of the government of India; furlough and retired pay to members of the Indian military and civil services when at home; charges of all descriptions paid in this country (England) connected with British troops serving in India, except for the purchase of stores to be sent to India. . . . In fine, the tribute is made up of such items of charge, connected with the government of India, as are spent in this country (*i.e.* England), and for which India receives no material equivalent in any form." Our Financial Relations with India, pp. 60, 61.

It is scarcely needful to remark that not one of these obligations has been accepted by the British Treasury. Every item relating to India — though paid *in England* now to the extent of twelve to fourteen millions a year — is debited to Indian account: so that the Indian empire does not cost the British taxpayer a single

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method which, by reference to the period of 1859 to 1868, and in less degree up to 1872, would be found to go far towards reducing the overwhelming difference between exports and imports under which India now helplessly struggles, would replenish her currency, would profitably employ millions of now half-employed and half-fed laborers, would stimulate industry and internal trade, would relieve the strain under which mercantile operations, both internal and external, are now carried on, and, above all, would tend to increase the food supply of the people and give them a chance to raise their standard of living. This method, which is so simple and obvious that it may seem an anti-climax when stated, is the vigorous prosecution in India of *productive* public works; not railways alone, — the relative value of which to India has been greatly over-rated, — but water storage, irrigation, harbors, and other works that can mainly be carried out by the people and from the materials of the country. This seems — and *is* — simple; why then is it not done? If this alone would not make India prosperous in the European sense of the term, it would at least arrest the deterioration and impoverishment now going on as an inevitable concomitant of that chronic commercial indebtedness of the outside world to India, the figures and facts of which are set forth in this article.

W. MARTIN WOOD.

Addendum. With regard to the amount added to the Indian debt held in England in the twenty-two years covered by the table on page 672, I have obtained, since the above pages were put in type, more precise figures. The net amount of sterling debt taken up in England in the years 1860–81 was £45,270,215. As to the "rupee paper" transmitted to England and "enfaced"

shilling. With such jealousy is this one-sided system of finance guarded, that when it has been pointed out that the British Treasury might, at least, give its guarantee on Indian loans raised in England — which would reduce the annual charge by two or three millions without costing the Treasury anything — such proposal has been scouted by official politicians of all parties.

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for payment there, the amount was about nineteen crores, (it is now over twenty,) or, say, fifteen millions sterling. Thus, instead of the sum added in the table, — *viz.* fifty millions, — it will be right to reckon sixty millions, thereby adding ten millions to the aggregate export figures of the period, and, by so much, increasing India's unadjusted balance for the twenty-two years, making it 425⅜ millions.

W. M. W.

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REVIEWS.

A History of the Legislative Union of Great Britain and Ireland. By T. Dunbar Ingram, LL.D. London and N. Y., Macmillan & Co., 1887. — 8vo, x, 231 pp.

This work is a history of the apologetical order. The author has come to the conclusion that the legislative union of Great Britain and Ireland was a measure of unqualified advantage to both kingdoms, and, furthermore, that it was accomplished by means entirely consistent with recognized principles of political morality. It is announced in the preface that the demonstration of these two propositions is the object of the book. As to the first, his task is comparatively easy. Outside of the small band of extreme Irish nationalists, few persons will be found at the present day, who, with any knowledge of the subject whatever, will defend the absurd system under which the two kingdoms were connected just previous to the union. Assuming that the best interest of both Great Britain and Ireland lay in the permanence of their connection, the legislative independence secured by the latter in 1782 proved to be a most dangerous boon. I say *proved to be* most dangerous; for that is not to maintain that from the outset it was necessarily so; and it is wide of the mark to abuse Grattan as our author does, for perversions of Irish freedom by other persons. Dr. Ingram is on treacherous ground when he intimates that Grattan was an enemy to the connection of the kingdoms. As a matter of fact, the granting of legislative independence in 1782 was, on the part of England, an act of irresponsible panic. When she recovered from the stunning effect of the American war, she could not revoke the concessions she had made to Ireland, but she was able to take care that they should go no further. Grattan and the Irish Whigs, who had secured the independence, found themselves thwarted in every attempt to perfect the system of constitutional order which they had hoped to rear upon the basis of a free legislature. The English government found means to keep Grattan in an opposition which rarely came within fifty votes of the majority in the Irish parliament, and which finally dwindled away to a bare half dozen members. Surely it is a little difficult, under the circumstances, to attribute to Grattan all the evils which developed in the system. It is true that the latter did, on several occasions, successfully urge the adoption of measures which unquestionably could be construed as having a separatist tendency. But his success on

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these occasions was clearly owing to the fact that, with denunciations of what seemed to him palpable invasions by England of the independence formally granted, he blended the most emphatic asseverations of his devotion to the connection. Though frustrated in the perfection of that scheme of constitution-building of which a free parliament was the foundation, Grattan was surely justified in every effort to maintain that foundation for possible use in the future. The author's whole treatment of the Irish Whigs is disingenuous. Anything else, however, could scarcely be expected from one who avowedly writes as an advocate rather than as a historian. In the discussion of the regency difficulty, in 1789, the bias of the author is particularly misleading. George III became suddenly insane, and the two kingdoms were left without a head. There was no law and no precedent for action in such a contingency. The recognition of the Prince of Wales as regent was the solution naturally suggested. But the prince was not in high favor with the Pitt ministry, and the latter accordingly delayed action in the matter till the prince could be brought to submit to certain restrictions on his power. The Irish parliament, meanwhile, having no especial interest in the restrictions desired in England, promptly tendered him the regency of Ireland with full royal powers. By a law of Henry VIII, the crown of Ireland is inseparably united with that of England. The Tories, whom our author follows, claimed that this union included the whole executive power in the two kingdoms, with all its incidents and phases, of which the regency was one; and that, therefore, Ireland had no right to act till England had first determined the depositary of the power. There are many and strong reasons for this position, all of which are duly set forth by the author. But he does not even allude to the chief argument by which Grattan and his followers defended their action; namely, that when, as in the present instance, the executive fell entirely in abeyance, and England presented no holder of that power to recognize, the very first law of national existence, that of self-preservation, imperatively required of the Irish parliament the filling of the gap in the governmental organization. It would seem to the unprejudiced mind that there is sufficient strength in this view to warrant its statement in a "history," if only for the purpose of refutation. The animus of the author, however, is perfectly revealed in this deliverance in reference to Grattan: "Nor should it ever be forgotten that he was the author and expounder of the meanest political doctrine ever preached to man, *viz.*, that England's necessity is Ireland's opportunity." As if England ever did, in all her history, concede any share of power or privilege to a subject or dependent state, except under pressure! To any but an Englishman, the author's plaintive moan is simply amusing.

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Misrepresentation and abuse of the Irish leaders is wholly unnecessary to the demonstration of the fact that the prestige of Great Britain, as well as the prosperity of both kingdoms, was constantly in danger under the connection as maintained after 1782. This fact is made sufficiently clear in the work before us. The necessity for a stronger bond to hold Ireland to England became imperative through the developments of the French revolution. A more or less disaffected and semi-independent kingdom on England's flank was a very poor equipment for the hard fight Pitt saw laid out for him by France. The security of the British empire was the one great and overwhelming consideration that actuated the ministry in the incorporation of Ireland by the union. Much was said, of course, about the great advantages to be derived by Ireland from the new system; and such advantages there were. But these were merely a matter of incidental detail. Pitt's continental policy required that, at all hazards, the combined forces of all the British isles should be well in hand for the grapple with France and French republicanism. It is this fact that has confirmed almost universally the belief that the means adopted to obtain the Irish parliament's consent to its own abolition were not in every case reconcilable with the abstract principles of morality. The author of the present volume believes that there is no ground for the charges of corruption generally regarded as proven, and undertakes to present good reasons for this opinion.

The general charge of corruption is ordinarily supported by the following specifications: First, the support of the owners of close or private boroughs was secured by a compensation bill, awarding £7500 for each seat vacated by the reduction of the commons from three hundred to one hundred in number. The million and a quarter pounds devoted to this purpose, it is held, was a mere corruption fund. Second, the Roman Catholic interest was conciliated by a definite agreement that the complete emancipation, which could hardly be expected from the Irish parliament, would immediately pass a united parliament. The agreement was not fulfilled by the ministry, but the hope was unquestionably very influential with the Catholic hierarchy. Third, promises of rank and pensions were freely used to draw waverers to the government's side. Fourth, Castlereagh used the secret service money of the government for the direct purchase of votes.

As to the first of these charges, the fact of the compensation is undeniable; but our author denies that such compensation was in any way corrupt. He admits that the union could not have been effected without the payment of some sum to the borough-owners, but he refuses to see in such payment any element of bribery. The difference between his view and that commonly adopted seems to consist in a fundamental difference in the conception of what constitutes bribery. If to be bribed

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is to allow one's act in a public capacity to be determined primarily by one's interest in a private capacity, there seems to be scant room for the author's view. He makes the ingenious assertion that, since the abolition of the private boroughs would be a confiscation of what had come to be recognized by custom as property, "to have refused compensation would have had the effect of virtually packing the House of Lords against the union. . . . The only way to render them impartial and capable of weighing coolly the advantages and disadvantages of the union, was to offer a fair and reasonable compensation for the loss of rights." When we consider that for some time a constant agitation for parliamentary reform had been kept up by Grattan and others, and that the widespread influence of the French revolution was at this time making the inveterate abuses of the representative system especially conspicuous objects of attack, the impartiality and cool judgment consequent upon this opportunity to convert an evanescent property into solid cash can be very clearly appreciated. The means by which the Catholics were conciliated to the support of the union were quite legitimate. No exception can be taken to the hope of full political rights as a motive for a judgment on a political policy. The doubtful point in this particular is the morality of Pitt's promising what he could not perform. Catholic emancipation as held out by the government in 1799, and the same as almost fought for in 1829, do not seem to be the same thing.

Our author defends the bestowal of titles and pensions as a reward for services rendered, on the ground that it was a common practice, which is perfectly true, and that there were not nearly so many bestowed on this occasion as on several other less important occasions, which does not appear especially relevant. His treatment of the charge of direct personal bribery for cash is characterized by similar non-sequiturs, though here the notorious difficulty of proving a charge of secret bribery is on his side. He could probably secure a verdict of not proven without dragging in such irrelevant evidence as the assertions of Cornwallis and Castlereagh that the opposition bought votes, or testimonials to the general good character of the former. As Castlereagh, by virtue of his leadership in the Irish Commons, was the man most closely connected with the actual working of the House, testimonials to *his* general good character would be more in order. The author seems aware of the difficulties that lie in the way of the one who seeks for these. He therefore limits himself in this respect to a letter of condolence written twenty-three years later by Plunket, an anti-unionist who afterward accepted office under Castlereagh, in which the latter's brother is assured that Plunket feels sorry that Castlereagh is dead, and that the deceased was wise and liberal in "all his public objects and opinions." And then

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our author asks in complete triumph: "Is it possible to come to the conclusion that if he [Plunket] had believed the accusations of corruption, he would have attended his [Castlereagh's] obsequies with praise of all his public objects and opinions?" The answer is supposed to be obvious. A skeptic, however, might ask whether the purchase of a vote is to be classed as a public object or a public opinion. The reader of Dr. Ingram's history will derive both pleasure and profit from it, only by bearing in mind that the author is a lawyer pleading a rather difficult case.

WM. A. DUNNING.

American Statesmen. Patrick Henry. By MOSES COIT TYLER. Boston and New York, Houghton, Mifflin and Company, 1887.—16mo, x, 398 pp.

Of all the figures of the Revolution, there is perhaps not one which the mists of a century have so enveloped in legend as that of Patrick Henry. A Patrick Henry myth has been formed, and has been fixed in literature by the uncritical character of his first biographer. It is creditable to the candor of Wirt that, though he unconsciously infused so much of his own imaginative spirit into the picture which he drew, he did not make that picture altogether favorable: when he admitted that Henry was perhaps illiterate, a poor case-lawyer, and an indifferent governor, it seemed like the unwilling concession of an advocate. Jefferson's criticisms on Henry, on the other hand, had the successful effect of many of his venomous attacks; and we owe to him more than to any one else a popular notion of Henry's lack of education and of his political instability.

Professor Tyler has therefore taken upon himself a double and difficult task: he has a firmly established tradition to break down; and he then undertakes to place before our minds a man dead nearly a century, who left few memorials, and whose character is unusual and in some respects incongruous. That Professor Tyler has succeeded in both parts of his task is due to unwearied and careful research, and to the historical judgment and skill with which the results are presented. Every possible clue seems to have been followed out; the papers which the Henry family generously placed at his disposal have yielded up material unknown or unused by Wirt; every available record of Patrick Henry, left by men who knew him, has been examined. It is not too much to say that the real Patrick Henry for the first time stands before us.

The duty of correcting misapprehensions has made parts of the book defensive and even polemic; but the plea is in general convincing. Against the charge of illiteracy, sufficient evidence is brought that Henry

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used and loved books. The biographer frankly admits the shiftless business habits of the young man, and counterbalances it by the proof that later in life he made a fortune by shrewd investments. To the rather unimportant charge that Henry had been a bar-tender, Professor Tyler is able to reply in substance that he was not a bar-tender but only tended bar. The assertion that Governor Henry showed irresolution and cowardice seems disposed of more satisfactorily. It is in discussing the profession of his subject that the writer makes his most important point. The original manuscript fee-books prove conclusively that if, as Jefferson asserts, Henry was a lazy and incompetent lawyer, it was not found out either by his clients or by the courts. The most interesting question taken up is of course the nature of his eloquence. It is not likely that any important testimony has evaded the biographer's careful search; and the evidence is such as to make it certain that Patrick Henry was endowed, as no other American of his time, and few men of any time, with an imaginative, irresistible and tremendous power of speech. That he knew how to play upon men's prejudices is apparent in the "Parsons' Case"; that he could also stir up the deepest springs of human action, is shown in his speeches on the American crisis. His eloquence can be measured by an unfailing test: he compelled people to vote with him.

The least successful part of the book is the study of Henry as a statesman. His honesty as a politician and a party leader cannot longer be doubted. He dared to do unpopular things because he thought they were right; and in the confusion of the Revolution, the Confederation, and the transition into a new form of government, it would have been wonderful if he had always found himself with the same political allies. His political wisdom, his ability to estimate the dangers of the times and the means of escape, these are quite another matter. No one will deny his power to inspire men with a willingness to make sacrifices for an ideal. Hence the magnificent period of his life was in the early days of the Revolution, when he made himself the political leader of the colony. But he could not hold the new state up to that standard — perhaps no one could have done it — and he never seems to have risen to the greater tasks left at the end of the war. It was Patrick Henry who introduced and secured the passage of a resolution by the Virginia legislature in 1784, calling for collection of delinquent requisitions by distress on the property of defaulting states or of their citizens; it was Patrick Henry who in 1788 declared: "I never will give up that darling word requisitions; my country may give it up; a majority may wrest it from me; but I never will give it up till my grave."

Professor Tyler's book is by no means confined to defence. More perhaps than any other of the *American Statesmen* series, it places before

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us a clear view of a man as he lived, and of his connection with the times. The arrangement is lucid, and Professor Tyler has enriched his work with references and a list of authorities such as has been wanting in most of the previous volumes. The style is lively, occasionally a little undignified and often florid. The book accomplishes its end; it gives us a picture of a great man in the midst of great events.

ALBERT BUSHNELL HART.

The Friendly Society Movement: Its Origin, Rise, and Growth; Its Social, Moral, and Educational Influences. By the Rev. JOHN FROME WILKINSON, M.A. Wadham College, Oxon.; Curate of Long Melford; Financial Member of the Independent Order of Odd Fellows, Manchester Unity; Hon. Member of the Ancient Order of Foresters, *etc.*; President of the United Sisters' Friendly Society. London, Longmans, Green and Co., 1886. — 229 pp.

Die Englischen Arbeiterverbände und ihr Recht. Von Dr. J. M. BAERNREITHER. Erster Band. Tübingen, 1886. — 450 pp.

These two books treat of the same subject and contain in many instances the same facts. They are written, however, from entirely different points of view. Mr. Wilkinson speaks as a member; Dr. Baernreither as an outsider. The former is an advocate; the latter is a scientific observer. The two supplement each other excellently for any one who wishes to obtain a complete survey of the friendly society movement.

Mr. Wilkinson's book treats in the first part of the rise of the friendly societies. He confines himself, however, mainly to the great orders, such as the Odd Fellows, the Foresters, the Shepherds, the Druids, *etc.* In the second part he speaks of the legislation with regard to friendly societies, explains at some length the technical features connected with their insurance system, gives an account of their management, and finishes with a survey of their social, moral, and educational influences. He lays especial emphasis upon the social element, saying: "It is, as it were, the match that sets free the sunbeams hidden in the heart of the coal." Mr. Wilkinson does not conceal the faults of the friendly societies, which have been brought to light in the various parliamentary investigations, but he writes as one who has full faith in the movement, not as a critic. The impression of enthusiasm which his book makes is perhaps intensified by a certain carelessness of style, in which the zeal of the missionary seems, for the time, to have crowded out the Oxford scholar's attention to form.

Dr. Baernreither's book is laid out on a much larger scale. In fact it is but the first volume of what promises to be an exhaustive treatise

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on the English workingmen's societies in general, including the trades unions. The introduction, which takes up nearly a third of the present volume, is in keeping with the thoroughness of the whole work. It describes the great economic development of England and the characteristics of its people. An account is then given of the origin, gradual reform, and present condition of the various classes of friendly societies, followed by a sketch of the legislation bearing upon them and of the attempted introduction of government insurance. Special chapters at the end of the book are devoted to the two great orders of the Odd Fellows and the Foresters, and to the associations of the miners.

The author describes England in a decidedly friendly spirit, and quotes at length the figures which show the wonderful expansion of her commerce and industry. It is interesting to notice that among the causes of the great prosperity of England is enumerated the protective tariff of the United States, which has the effect of excluding us from competition in neutral markets. In addition to the natural advantages of England, an important element in her progress has been the character of her people. They form a "society free, politically and industrially, which is guided by an active, often reckless love of gain, but in which a sense of duty and earnestness are striving to re-establish the lost equilibrium." The practical side of the English nature has not only aided her progress but it has also prevented the growth of socialistic doctrines, the workingmen of England preferring to aim at what is attainable rather than to yield to the illusion of vague schemes for universal happiness.

Great changes have, however, taken place in the administration of England during the century, and there has undoubtedly been a strong drift towards state interference or what is sometimes called socialistic legislation. The beginning of this was seen in the Factory law of 1833. Since then many laws have been made to protect the laborer and regulate his contracts, notably the Employers' and Workmen's act of 1875, the Conspiracy and Protection of Property act of the same year, and the Employers' Liability act of 1880. With this increase in the activity of the central government has come a decided change in local self-government. The old plan of entrusting local authority to justices of the peace, appointed by the sovereign, is gradually giving way to a system of boards, elected for specific purposes by the voters. In this way there have successively arisen the boards of guardians of the poor, the local boards of health, and the school boards, all of which are placed under the general supervision of central boards. Thus a specialization of functions has been accompanied by an increasing supervision on the part of the state.

What the author calls the "self-government of the working classes,"

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or the management of their associations, has undergone very much the same change. It shows the same tendency towards centralization, division of labor, and supervision on the part of the government, though the governmental interference "has not aimed to replace the activity of the individual but to strengthen the individuals in their independent battle for social equality and to grant to them in it the necessary protection and support."

The typical forms of this self-government are the trades union and the friendly society. Of these the trades union is undoubtedly the more important. The friendly society is, however, older, and it may be said of it that its development has reached a certain completeness which makes it fitting that it should be first described. There are many friendly societies still existing which date back to the seventeenth century. In fact, in 1883 there existed no less than seventy-seven English societies of which the youngest dated back to 1780 and the oldest to 1687.

These societies show a great diversity in their outward forms and in their objects. Almost every conceivable kind of organization is found among them, from the simple village club, meeting in an inn and making special collections for each case of necessity, to the great order, managed by trained officials, organized in accordance with the most approved principles of insurance, and numbering over six hundred thousand members. The societies may be roughly divided into eleven groups. The simplest of all are the so-called "sharing-out clubs" or dividing societies, which exist generally only for a limited time, often for a period of seven years. Their chief characteristic is that their members contribute towards a common fund, which is drawn upon in case of accident or sickness, and the balance of which at the expiration of the period is divided among the members. The deposit friendly societies, on the other hand, are somewhat in the nature of savings banks. They are intended, not only to insure their members, but also to encourage them to save, and the amount of assistance that each member can draw from the funds is limited to the amount of his deposit. Some societies are established especially for furnishing burials. Some are general, that is to say, take in all classes of men; some, though comparatively few excepting among the miners, confine themselves to special trades. Many friendly societies have been established in connection with and under the tutelage of some factory or other industrial establishment, and many of the great railroad companies have distinguished themselves by organizing such societies for their employees. The most perfect of the friendly societies are the great orders of the Odd Fellows and Foresters, which are excellently managed and have a large membership. Finally there has arisen of late a class of juvenile

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friendly societies. These began in the Sunday schools, but recently the Foresters have established juvenile branches of their associations, which are to serve as feeders for the main society.

The primitive friendly societies were naturally exposed to many abuses. "They undertook, with an insufficient apparatus, a task to which they were not equal in their original form." In many cases they found that, as the membership grew older and the demands upon them increased, the younger members refused to remain in the society. Thus many societies were dissolved, greatly to the disadvantage of those who had paid their contributions regularly for years and had never received any benefit from them. In 1867 it was found that from 1793 to that date 38,315 societies had been registered, and that of these 13,935 had been dissolved. It was estimated that there were probably over four thousand persons at that time in English and Welsh workhouses who had been members of such societies.

Some kind of reform was therefore needed almost from the beginning; and the reform movement, though it has been carried out in a somewhat tentative manner and not always with great success, may be said to have had constantly three aims in view: (1) to replace the simple assessment system by the premium system; (2) to introduce better methods of accounting and better investments for capital; (3) to separate the different kinds of insurance and establish special premiums for insurance against sickness, superannuation, burials, *etc.* This reform movement has been pushed, partly by the societies themselves, partly by philanthropists who have been interested in them, and partly by the government. But in spite of these efforts their complete reform is resisted by the inertia of the societies themselves, and many years will probably be needed to put them all on a sound basis.

That they have not yet attained to that condition, has not been for lack of legislation. From 1793 to 1875 over twenty laws have been passed dealing with the subject. Yet as the legislation has always been of an optional character, it has not received universal application. Even under the law of 1875 a society can be formed without any authorization from the state, and registration is entirely voluntary. Those that are not registered are not, it is true, invested with corporate powers. They cannot therefore sue, nor be sued, nor hold property, and they are not even protected against fraud or malfeasance on the part of their officers. The possibility of obtaining these legal advantages, together with the additional privilege of investing their funds with the commissioners of the sinking fund at three per cent, constitute a strong inducement for registration. Yet there are still many societies that have not registered. The result of registration is to put the societies under the supervision of the chief registrar and to render them liable to suspension or dissolution in

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case of mismanagement. They are obliged to render three kinds of reports: (1) an annual report of their general condition; (2) a quinquennial report on the rate of mortality; and (3) a quinquennial report on their finances, containing a carefully prepared valuation of their liabilities and assets. This latter is the most important of the three, inasmuch as it shows whether the societies are on a sound business basis or not, and it has had the effect of disclosing a condition of things far from satisfactory. In 1883 there were altogether 6,567 registered societies in England and Wales. Of these there were 1,537 with funds amounting to £4,002,070, which had a surplus aggregating £885,382; but, on the other hand, the remaining 5,030 societies, whose funds amounted to £4,378,781, had a total deficit of £5,155,816. Thus but a quarter of the English societies were really in a sound condition. In Scotland the figures were not quite so unfavorable, there being about a third which showed a surplus. It may seem strange that societies are able to maintain themselves when their business condition is so unsound; but it should be remembered that the liabilities of such a society are not immediate but contingent, and are estimated according to the principles of insurance, and that in many cases the devotion and public spirit of the members carry them through in spite of the unfavorable balance on their books.

The undoubted faults of the friendly societies have suggested the idea of government insurance, and this has actually been carried out in Gladstone's law of 1864 and the later law of 1882. This mode of insurance has, however, never been popular, and the idea of compulsory insurance, though agitated, has thus far met with a cold reception.

One cannot help contrasting the whole development of what the Germans would call "social-political legislation" in England with its course in Germany. The latter country has not hesitated to apply compulsory insurance to whole classes of its population. It has been estimated that the law of 1884, which provided for insurance in industrial establishments, applied to about 2,700,000 persons, and that the law of 1886, relating to the insurance of agricultural and forest laborers, covered nearly 7,000,000 persons. Thus immense groups are forced at once and without ado to provide for their needs.[1] England, on the other hand, has been struggling with the subject for nearly a century and has as yet reached no thorough and systematic plan. She has contented herself with trying to cure some of the most glaring faults of the existing societies, and the whole course of her legislation has been empirical, fluctuating, and slow. Yet under its shelter institutions have grown up which, in spite of their many faults of detail, have proved an important

[1] Conrad's *Jahrbücher*, XIV, 6, S. 535.

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means of education to large classes of the people, have encouraged forethought and frugality, and are all the stronger from being rooted in the dearly bought experience of their members.

HENRY W. FARNAM.

Die Gewinnbetheiligung, ihre praktische Anwendung und theoretische Berechtigung. Von HEINRICH FROMMER, Doktor der Staatswissenschaften. Leipzig, Duncker & Humblot, 1886. — 162 pp.

Dr. Frommer's essay was originally offered in competition for a prize, which it obtained, at the Kaiser Wilhelm University at Strassburg in 1885, and was enlarged for publication subsequently, in the light of studies pursued under Professors Knapp and Brentano. It is not a work founded on original investigations like Dr. Victor Böhmert's treatise, but is, predominantly, a critical sifting of the material presented in Böhmert's volumes and in the second part of the *Enquête de la Commission extra-parlementaire des associations ouvrières* of 1883, which was devoted to participation. In the two inquiries made by Dr. Böhmert and the French commission, Dr. Frommer finds many faults, both of omission and of commission; and, judging them by the standard of the ideal scientific investigation, he sets them down as examples of what such inquiries ought not to be. To exhibit in detail the defects in Dr. Böhmert's exposition he chooses the two noted English cases of Henry Briggs, Son and Co., and Fox, Head and Co. The twenty-five pages in which Dr. Frommer gives a very minute history of the industrial partnership at the Whitwood Collieries form the most satisfactory account of that celebrated experiment now to be found. Here, as in the case of Fox, Head and Co., the writer sympathizes with the workmen in their attachment to the trades union, and considers it a proof of their intelligence that they virtually chose to stand by the well-tried union rather than by the new scheme of profit-sharing.

Proceeding to a nearer examination of the cases of participation given by Dr. Böhmert and the French commission, Dr. Frommer throws out the great majority of them as insufficiently reported, or as lacking in some essential feature of true profit-sharing, and finds only twenty-seven cases which deserve to be considered pertinent. Of these, four are agricultural, and the others occur in various departments of trade, commerce and manufactures. A very condensed, but very comprehensive statement is given of the details of each experiment, followed by a summary of the results, favorable or unfavorable, of the working of the new scheme. In agricultural operations Dr. Frommer's general conclusion is that the sphere for profit-sharing is very limited, piece-work and premiums being more effective agents in improving the quality of labor.

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In other directions, also, he sees a more limited field for participation than is claimed for it by Dr. Böhmert, M. Chas. Robert, and Mr. Sedley Taylor. He sums up:

> The only sphere in which profit-sharing, as a wages-system, deserves preference over all others, has been shown to be in those cases in which the conduct of the profit-sharing workmen is of extreme significance, less for the success of this or that undertaking, than for the whole business in all its aspects; and in other directions where the workmen either have the intelligence (as with the higher employees in a business), or from the nature of the occupation (as in the deep-sea fisheries) easily learn, to know that their conduct stands in close connection with the increase of their returns through the success of the undertaking; in the cases, then, in which one might almost say, it has always been applied.

Dr. Frommer's "sifting" seems to me to have been done with good judgment; but I am unable to see how he can logically draw so meagre a conclusion as that just quoted from the winnowed facts which he has set forth. In every special instance he very fairly sets forth the advantages to which profit-sharing has appeared to give rise, but in his general summing-up they have, somewhat curiously, evaporated. It is a damaging comment on the preference of payment by the piece that several signal triumphs of the profit-sharing principle have been scored in industries where piece-work is the rule, *e.g.* in printing establishments. Dr. Frommer lays little or no emphasis on the feeling of partnership which profit-sharing induces more than any of the substitutes which he prefers to it. This feeling will inevitably tend to bring about more of the good results reached by several of these substitutes than any one or two of them could produce.

The chief value of this work lies in its circumstantial account of the Briggs case, its careful sifting of instances of participation, and its excellent statement of each of the sifted cases. The "theoretical justification of profit-sharing" which forms the third part is an extreme instance of the mountain laboring.

NICHOLAS P. GILMAN.

Wealth and Progress: A Critical Examination of the Labor Problem. The natural basis for industrial reform or how to increase wages without reducing profits or lowering rents: the economic philosophy of the eight-hour movement. By GEORGE GUNTON. New York, D. Appleton & Co., 1887. — 12mo, xxiii, 382 pp.

The number of books on the labor question has multiplied rapidly during the past decade, but with few exceptions little of permanent value has been added to our stock of knowledge. By far the great

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majority of treatises either have abandoned the wage-fund theory, without substituting any consistent body of doctrine, or have been the media of pretentious panaceas and one-sided reforms. Mr. Gunton's work is deserving of all the greater attention on this account, for it may be declared, without hesitation, to be the most notable contribution to the subject since Walker's *Wages Question* — all the more remarkable from the fact that until within a few years its author was a factory operative. As the title indicates, the book is intended as an antidote to Henry George, but it is a work of a far different order. Mr. Gunton is thoroughly acquainted with the literature of the subject — at least with the English literature and so much of the continental as has been translated into English; his method is truly historical and inductive; his style is free from sentimentalism; his conclusions are conservative and without crotchets.

Mr. Gunton maintains that the labor problem is not merely a question of distribution; it is rather a question of production. The existing stock of wealth is so small that a more equal or even a perfectly equal distribution among the huge mass of producers would improve their lot very little. The first condition of any material improvement is an increase of production, the second condition is a rise of real wages. The two questions he sets out to answer are these: How can the use of improved methods of production be increased, and how can the general rate of wages be permanently advanced? If this can be done, then poverty can be diminished without decreasing the income of the profit and rent receiving class.

In Part I the law of increasing production is discussed. The socialistic fallacy that labor produces and measures all wealth is exposed. As Mr. Gunton says: "Wealth is produced by the combined efforts of labor and capital, and as the proportion of the total wealth produced by human labor diminishes, the actual amount the laborer receives increases." The real cause of improved machinery is the increased consumption by the masses, or in other words higher wages. This is Mr. Gunton's main position: that the extent of the market is chiefly determined by the consumption of the laboring classes, and that it is only as real wages rise and labor becomes dear that it is worth saving, and the use of cheaper methods (machinery) becomes an economic necessity. The secret of cheaper production is thus seen to be higher wages.

This brings the author to the law of wages, which is discussed in Part II. The wage-fund theory and its attempted rehabilitation by Cairnes are easily disposed of. General Walker's theory of wages is severely and, as it seems, successfully attacked; for his theory that production is the measure of wages depends on the assumption that rent and profits are

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taken out of the product *before* wages are paid, while according to his own showing rent and profits consist of what remains *after* wages are paid. Mr. Gunton, on the contrary, maintains that, instead of wages or consumption being governed by production, production is everywhere determined by consumption or wages. A chapter is also devoted to Henry George's theory, which it is naturally not difficult to overturn.

We come then to the positive side of the argument. Mr. Gunton's doctrine of wages may be summed up as follows: that the chief determining influence in the general rate of wages in any country, class or industry is the standard of living of the most expensive families furnishing a necessary part of the supply of labor in that country, class or industry (page 89). In other words, the price of labor is governed by its cost of production, the cost of producing labor is fixed by the standard of living of the family, and the standard of life is determined by the habitual wants of the people. The economic law of wages is the standard of living. The truth of this law is tested inductively. A series of chapters is devoted to the history of wages, especially in England; and the rise of wages in the fourteenth and again in the nineteenth century is shown to conform to this explanation. These chapters are admirably worked out. The wages of agricultural laborers have risen very little in comparison with the wages of factory hands, because the social influences which raise the standard of living among the latter have not operated on the former. Wages are higher in large cities than in small towns. The income of the family is not increased by the wages of the wife and children, for men's wages fall as the earnings of wife and children increase. Dr. Engel's law of expenditure is analyzed, and is shown to conform to the theory. Thus from every side facts and illustrations are used to test the adequacy of the law. This being granted, the problem of increasing the wants, developing the character and advancing the wages of the laborer resolves itself into the question: How can the social opportunities of the masses be enlarged?

Part III therefore treats of the principles and methods of social reform. Rent, profit, tax and money reforms, including the socialistic remedies, are shown to be of no avail. The only possible remedy is the comprehensive measure of increasing production and at the same time developing the laborer's character and raising his standard of living. This in civilized countries can be accomplished only by reducing the hours of labor. Of course too great a reduction would diminish rather than increase production, would promote dissipation rather than develop character, and might thus degrade rather than improve the position of the masses. Mr. Gunton, after a careful statistical and comparative survey, concludes that an eight-hour law would be economically safe. The effect of such a law upon rents and profits is clearly set forth, and

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a series of chapters is then devoted to a succinct account of the feasibility of short-hour legislation and of its history in England and America. The position of the English laborer is shown to have advanced far more than that of the continental, and relatively more than that of the American laborer. The book closes with an earnest assertion of the social and political necessity of such a reform; but the author is careful not to set it forth as an absolute cure-all.

Mr. Gunton's main point — that wages depend on the standard of life — has already been frequently advanced by other authors, beginning with Adam Smith and Ricardo. But no one has hitherto made it the central point of the doctrine; no one has hitherto erected it into the fundamental law of wages; no one has hitherto added the important corollary that production depends on consumption and that distribution is a necessary part of the process of production. In this consists the importance of Mr. Gunton's contribution to the science of economics. Whether it commands the assent of economists or not, it must at once challenge attention for its consistency and its breadth, for its wide foundation and carefully guarded distinctions, for the thoroughness with which the alleged law is tested statistically as well as historically, for the conservative conclusions and cheering prospects held forth for the future of the laboring class. In the face of such qualities, criticism of minor points, such as the author's implicit reliance on Mulhall's statistics, would be invidious.

Wealth and Progress is intended chiefly for popular reading, although as has been indicated it is highly important for economists. In another work, which is as yet in manuscript but which I have been privileged to see in parts, a more strictly scientific discussion of the laws of political economy will be given, including the inter-relation of the laws of wages, profits and rent. In the discussion of these questions, the author reaches conclusions which differ in many respects from the currently accepted doctrines. It will be wise therefore to reserve a general criticism of Mr. Gunton's theories until the appearance of this supplementary work. But no one who desires to study the problem can afford to overlook the remarkable treatise which has just appeared.

EDWIN R. A. SELIGMAN.

The Silver Pound, and England's Monetary Policy since the Restoration: together with the History of the Guinea. Illustrated by Contemporary Documents. By S. DANA HORTON. London, Macmillan & Co., 1887.

It is easy to outline the general drift of Mr. Horton's book, and it is not less easy to decide upon its general merits, in spite of its bad arrange-

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ment and involved style. It is not an economic or financial essay; it is more like a lawyer's brief, and after reading a part we unconsciously turn back to look for the caption: S. Dana Horton *vs.* Lord Liverpool *et al.* The charge made is that the one-metal theory, which was established, Mr. Horton claims, (I should say, recognized,) by Lord Liverpool in his essay, was a "creature of our time, distinctly modern and revolutionary, an ephemeral product of irrelevant learning, without parentage of statesmanship, or claim of title supported by any prescription in the past." Starting with the view that the adoption of a gold standard by England was a most grievous monetary error, that the disinherison and legislative outlawry of silver have induced monetary chaos, and that the state has unlimited power to regulate the value of its coins, Mr. Horton finds that the position of England on the silver question is the only bar to the rehabilitation of that metal, and it is to Englishmen that his work is primarily addressed. Its value is greatly impaired by its dogmatic tone and its one-sidedness, a trait that inclines the reader to question that portion of the book which should be the most valuable, the historical part, copiously illustrated by material unearthed through much laborious research.

An example of the way in which Mr. Horton employs his material is to be found in his attempt to prove that Locke was not a one-metal advocate, but believed in two metals, because he recommended the free coinage of both silver and gold. To support this interpretation of Locke's position, Mr. Horton quotes from a hitherto unknown report he has discovered, prepared, as he thinks, by Locke, recommending a reduction in the value of the guinea, but expressly asserting that it was impossible for more than one metal to be the true measure of commerce. This is, of course, an awkward phrase to Mr. Horton, who seeks to explain it away by promising to show what was the situation at the time the report was written — a promise he omits to fulfil. In lieu thereof he remits the subject to the "reader's activity of search amid the subtleties of monetary doctrine" — whatever that may be — and finally expresses his conviction that Locke's coinage essays were, after all, not to be regarded as his serious work, not to be considered alongside of his philosophical writings. This leaves the reader, gentle or otherwise, full freedom to exercise his activity of research amid the first subtleties that offer themselves, but does not prevent Mr. Horton from holding up Locke as deserving to be known to posterity as the original proponent of the ratio $15\frac{1}{2}$ to 1. I submit that this is neither history nor political economy. Employing such methods, Mr. Horton easily proves the shortcomings of English statesmen in allowing gold to become plentiful early in the eighteenth century, and exposes the almost criminal act of Lord Liverpool in perpetrating his essay. Later events in monetary history have

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been so fully disposed of in Mr. Horton's previous works, that we need not notice them.

It is difficult to see how such a book can have any influence. It will be welcomed by the bi-metallists of England, but to the so-called opponents of silver it offers nothing. It is curious that so much labor should have borne fruit at the very time when the most cherished doctrine of the supporters of silver, the appreciation in the value of gold, is falling before criticism. The royal commission in England, and Mr. Wells and Professor Laughlin in the United States, have marshalled an array of facts which throw much doubt upon that doctrine. It is a pity that Mr. Horton's industry could not be utilized in other lines than that he has chosen.

WORTHINGTON C. FORD.

Railway Rates, English and Foreign. By J. GRIERSON, General Manager of the Great Western Railway. London, Stanford, 1886. — 8vo, viii, 208, lxxii pp.

Railway Practice: Its Principles and suggested Reforms reviewed. By E. PORTER ALEXANDER. New York, G. P. Putnam's Sons, 1887. — 8vo, 60 pp.

Railway Problems: An Inquiry into the Economic Conditions of Railway Working in Different Countries. By J. S. JEANS. London, Longmans, Green & Co., 1887. — 8vo, xxviii, 560 pp.

State Purchase of Railways. By CHARLES WARING. London, Chapman and Holt, 1887. — 8vo, xi, 204 pp.

Traité des Chemins de fer. Par ALFRED PICARD. Paris, Rothschild, 1887. — 3 vols., large 8vo, xii, 720, xxviii, 1002, xxiv, 714 pp.

The attention paid to the questions of transportation in various countries continues with unabated vigor. Nowhere has the problem been definitely solved, but it is especially in England, America and France that the discussion is most active. Among the theoretical works of the past year those here reviewed may be considered the most important.

Mr. Grierson's *Railway Rates, English and Foreign* is written essentially to advocate the railway cause. This at once stamps the work with a certain mark of foregone conclusions. The difficulty with works of this kind is that in their zeal to combat obvious but widely diffused errors of the "anti-monopolists" they themselves fall into equally extreme mistakes. Mr. Grierson performs a valuable service in proving that many of the charges brought against railway companies are based upon evils which the companies did not create and cannot

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alter, and that other supposed grievances could not be removed without injury to the community. He shows for instance that many of the projected reforms would produce inequalities almost as crying as some of those which exist to-day. Thus a chapter is devoted to proving the old point, familiar to experts but unknown to the general public, that equal mileage rates are inexpedient and unfair. Differential rates, and in particular that variety of them known in England as "grouping," are well explained and stress is laid on the interests of the consumers themselves in the maintenance of these differences. Mr. Grierson is thoroughly acquainted with the practical working of the continental lines, and his book consequently contains rich material as to rates, classification and working arrangements throughout the European countries. In fact we know of no work written in the English language which contains an amount of trustworthy information at all comparable to this. His book is therefore peculiarly valuable, if only for the positive data which it here gives to the general public. At the same time it may be doubted whether he successfully refutes Sir B. Samuelson's statement that the continental rates are lower than the English rates.

But while all these points are cleverly and accurately set forth, the tone of Mr. Grierson's book is too aggressively partisan. His heated opposition, correct enough in principle, to the cost of service theory is carried to such a length as to justify all existing differential rates. His advocacy of classification, again correct enough in principle, leads him to defend in all cases the classification suggested by the railways themselves. His theory of "charging what the traffic will bear" is summed up in the words: "Producers pay what they find it worth while to pay; they pay no more" (page 77). Of course such an exposition gives but one-half the truth. It is essentially the railway standpoint, and lacks the broader scientific basis which it is almost impossible for a railway official to obtain. The analysis of rates is clear but incomplete. In a perfect system of railway rates, charging what the traffic will bear becomes not the primary, but the secondary consideration. It is because Mr. Grierson assigns to it the first place that his book is incomplete. But barring this fundamental defect, the work is excellently adapted to be put in the hands of students. It is a valuable counterpoise to such thoroughly pernicious productions as that of Mr. Hudson, and even if it errs somewhat on the other side, it contains so much detailed practical information that it must be declared a permanently valuable contribution to the literature of the subject.

Almost identical criticisms may be urged against Mr. Alexander's *Railway Practice*. Mr. Alexander is an American, as Mr. Grierson is an English, railway official, and each of course has primarily the problems of his own country in view. Mr. Alexander's book is far less

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ambitious, although just as clear, and contains only a short discussion of the principles of rates with a few examples from American practice. It is noteworthy that he bitterly opposes personal discrimination, — as in fact do all the better railway managers in this country to-day, — but he clearly sees that it can be abolished only by some form of pooling. It has taken the American railways a long time to see the wickedness and fruitlessness of railway wars, and Mr. Alexander here proves that he has become an entire convert to the doctrines of Mr. Fink. The general public has not yet advanced so far. But while in this matter Mr. Alexander is perfectly sound, it is otherwise with his treatment of differential rates. After a lucid explanation that one cause of discrimination is the existence of "competitive points" he goes on to say: "The competition which gives birth to such discrimination determines also their sizes, or the extent to which they must go. What are the rates to intermediate points has nothing to do with the case" (page 14). This is stating the matter too strongly, for it would always justify a greater charge for the shorter haul. Such a charge must be the exception and not the rule, as Mr. Alexander would have it; and in the late case of the Vermont State Grange *vs.* The Boston and Lowell Railroad Co., the Interstate Commerce commission has come to the correct conclusion. Mr. Alexander should try to revise his theory in this particular, and his essay would then be without flaw.

Mr. Jeans' *Railway Problems* is more bulky than important. It goes very little into questions of theory, which are at present the engrossing problems, but concerns itself chiefly with such matters as cost of construction, capital, earnings, expenses, rolling stock, taxation, *etc.* The book is written from the statistical point of view, and its pages fairly bristle with tables of every possible kind. Unfortunately, however, there is little reference to the sources from which the figures are taken, so that the tables must be accepted with great caution. In a few instances, where I have been able to collate the figures with standard accepted authorities, I find serious discrepancies. So on page 55 Mr. Jeans puts the rate of dividend of the American railways at 5.4 per cent for 1884. This is manifestly incorrect. In reality it was less than half of this amount. Again, on page 102, the average earnings per train mile in the United States are given as 8 shillings. In reality they were only $1.50 or 6 shillings, — less than in some other countries. The tables as to foreign railways are borrowed from the *Statistique des chemins de fer de l'Europe*, many of whose figures it is well known must be taken *cum grano*. Yet Mr. Jeans' entire acquaintance with continental methods seems to be derived from this source. As a specimen we may adduce the statement on page 516, that the American system of "pooling" has no exact counterpart in other countries, be-

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cause it seldom happens that there is more than one route to travel by. The veriest tyro in railroad economics knows that the pooling system is far more developed in Europe than in the United States. Statements of this kind make all the other unsupported assertions extremely doubtful, so that the student must be warned against placing implicit reliance on Mr. Jeans' book. Moreover he avoids the entire question of rates, by asserting that "upon the point we offer no opinion" (page 524). The author of such a pretentious volume should at least have some opinion to offer.

Mr. Waring's *State Purchase of Railways* is an outcome of the present English agitation on the question of rates and fares, and deserves attention as the first really elaborate plea for state railways in England since Galt's book of 1843. Mr. Waring is very fair-minded, and in discussing the points raised by Mr. Grierson confesses that much of the latter's contention is true. He goes even further, and maintains that cost of service rates are one of the worst forms of protection, or rather of obstruction. But while admitting the value of differential rates, Mr. Waring strongly holds that charging what the traffic will bear is simply a disguise for the trade law of "grabbing." The companies are strongest, and can generally dictate their own terms. He holds that there is no remedy for the unquestionable evils of railway management as long as railways are worked as a separate industry trading for profit instead of being used as machinery for the promotion of all other industries for the benefit of the entire nation. The only remedy is government management. At the same time Mr. Waring is careful to demand state purchase only for Great Britain, holding that in the United States it would be utterly out of question on account of the attendant political evils.

The points are generally well taken, and a great degree of fairness is shown in discussing the alleged shortcomings of private management. It may be doubted however whether the Belgian system is not painted in too rosy colors, and whether sufficient stress is laid on the possibility of effective state control as opposed to state management. But with one exception the volume constitutes an undoubtedly strong plea for a vital change in management. This one exception, which almost vitiates the value of the work, is the demand for a fixed universal rate irrespective of distance (pages 94–101, 140–156). The true basis of rates is held to be the post-office system. This fantastical project is not new. It was advocated at length by Galt in 1843 and by Brandon in 1868, although both of these confined their demands to passenger fares. But in Germany the scheme has been frequently broached, especially by Perrot in his *Anwendung des Penny-Porto Systems auf den Eisenbahntarif* in 1873. On the continent this project is now a dead issue, so

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thoroughly has its fallacy been exposed by various writers, such as Cohn, Wagner, and Sax. That the scheme is again soberly advanced in England is an additional proof of the haste with which writers rush into print in the blissful unconsciousness of what has been done and written by others. The first thing for a man to do who has advice to give, is to be acquainted with the already existing criticisms on his plan. Had Mr. Waring done this, he would probably not have published his chimerical scheme at all.

The *Traité des Chemins de fer*, by M. Picard, is a stupendous undertaking, being no less than a complete treatise on the economics, finances, administration and law of railroads in every part of the world. M. Picard is favorably known as the author of the history of French railway legislation, as set forth in his six volumes on the *Chemins de fer français;* but in the comprehensive treatise just published he gives a systematic exposition of the entire subject. It may be declared without hesitation the most complete work of the kind in existence. The theoretic discussions are generally marked by impartiality and signal ability, as well as by a fairly good acquaintance with the literature, — although for a knowledge of foreign systems M. Picard seems to depend in the main on French authorities. The work is so immense that it will be practicable to give only a bird's-eye view of the conclusions. Volume I contains a history of railways in France and an estimate of the economic results. The subject of competition and pooling in every country is well treated, as is also that of competition with waterways. In each case competition is shown to be illusory. Then follows a careful history and criticism of state *versus* private management. The arguments *pro* and *contra* are impartially weighed, with the conclusion that no general answer can be given applicable to all countries, — but that for France private management is preferable. This part of the work is admirable. Volume II treats of charters, the relation of the railways to the investors, the financial administration, construction and maintenance of way. Volume III treats of the administration and governmental control in the various states, the technical operation of railways including accidents, and cost of service. A fourth, and what promises to be the most interesting, volume is about to appear, devoted to the general subject of railway charges, and I shall defer any general criticism until the completion of the work. Although France is the pivot of the discussion, a fairly complete comparison is made with the rest of the world, so that the treatise forms a veritable cyclopædia indispensable to the earnest student.

EDWIN R. A. SELIGMAN.

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Die Maxime Laissez faire et laissez passer, ihr Ursprung, ihr Werden. Ein Beitrag zur Geschichte der Freihandelslehre. Von Dr. AUGUST ONCKEN. Bern, Wyss, 1886.—8vo, 131 pp.

No one phrase in the literature of political economy has been more lauded by its admirers, more decried by its opponents, than the one which forms the subject of this essay. And yet for the current explanation of its origin and history we have had hitherto to depend on the uncritical and inexact accounts given principally by Dupont de Nemours in his editions of the Physiocrats. Professor Oncken has expended an immense, perhaps even an unnecessarily great, amount of research to probe the matter to the bottom, and now for the first time succeeds in giving a fairly complete and satisfactory history of the great shibboleth.

The phrase itself is currently ascribed to Gournay, although Turgot tells us it was first used by a merchant in a conversation with Louis XIV. Professor Oncken justly remarks that the maxim is really composed of two separate parts, *laissez faire* or liberty of production, and *laissez passer* or liberty of exchange. The first half of the formula, at least in the form *laissez nous faire*, was probably first employed in 1680 by Legendre, known to all American students as the author of a work on geometry, in the course of a controversy with Colbert. But all Dr. Oncken's researches have failed to throw any clearer light on this reputed conversation. More successful however is the effort to show the first appearance of the phrase in scientific literature. It is due beyond all doubt to Marquis d'Argenson, minister of finance under Philip of Orleans, and minister of foreign affairs under Louis XV. Oncken shows very well — although the proof was not necessary for those who have emancipated themselves from the current traditions of French and English histories — that the phrase *laissez faire* as used by Boisguillebert and Vauban at the very beginning of the eighteenth century does not at all mean free trade in the modern sense. He might have added that "free trade" in the writings of all the English economists with scarcely any exception down to the middle of the eighteenth century meant only freedom of export. Child, Petty, North, Locke, *etc.*, were free-traders of a quite different kind from the Manchester school. Oncken however confines himself to the French, and shows that d'Argenson first used and expounded the phrase in his memoirs in 1736, and again in 1751 in a series of articles in the *Journal Œconomique*. D'Argenson was not a Physiocrat, and hence to ascribe the phrase to the Physiocrats is a mistake. D'Argenson was likewise the author of the celebrated saying: *pour mieux gouverner, il faudrait gouverner moins.*

So much for the first and more important half of the maxim. The

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latter half, completing it by the words *laissez passer*, was indeed due to the Physiocrats, although the nearest approach to it in any of the scientific works is "*le monde va de lui même*" used by the Marquis de Mirabeau in his *Philosophie rurale* in 1763. Mirabeau himself afterwards tells us, in the *Ephémérides du citoyen* of 1767, that the intendant Gournay used the full formula *laissez faire et laissez passer* during a conversation. Oncken can find nothing to cast discredit on this assertion. This half of the traditional report, although often obscured and misrepresented, can therefore stand.

It may seem a waste of energy to devote so much careful research and above a hundred pages to the discussion of such a subject. But science can only have thanks for a student who is willing to expend his energy in a scholarly manner and finally put to rest a much controverted point. Dr. Oncken has accomplished this and his essay deserves to be read.

E. R. A. S.

Allgemeines Verwaltungsrecht. Von Dr. O. von Sarwey, Staatsminister in Stuttgart. Freiburg in Baden, 1887. — Lex. 8vo, iv, 177 pp.

The work before us belongs to that admirable series of treatises upon public law, already noticed in this Review, Marquardsen's *Handbuch des Oeffentlichen Rechts*. Under the title "General Administrative Law," Dr. Sarwey has given us, in reality, a (very general) treatise upon *comparative* administrative law. It lies in the nature of the subject that a book on general administrative law can be nothing more than a comparison of the different rules of law which we find in force in the different modern states. If an author attempts anything more his work becomes a treatise on administrative science, devoted more to what ought to be than what is. Dr. Sarwey frankly accepts these limitations, and expressly says that his book is comparative rather than critical or speculative; but, in addition to the mere comparison of different systems of law, he attempts to lay down a system for the treatment of administrative law in general. We must therefore criticise the book as a book on comparative administrative law and as an attempt to offer to the student of administration a system which he may follow in his study of administrative questions.

The book, like all works in administration, starts out with the endeavor to separate what is known as administration from the other functions of government, *viz.* legislation and judicial decision. Dr. Sarwey's treatment of these extremely difficult and intricate questions is interesting and able, but it does not seem to me that he has been more successful than

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his predecessors in reaching a formula which expresses, in all countries and at all times, the exact difference between the different functions which he discusses. He says that legislation is the expression of the will of the supreme authority in the land. In the United States this would hardly be admitted to be true by the best of our lawyers. Ordinary legislation is with us the expression of the will, not of the highest authority in the land, but of one of the authorities created by the supreme authority, *viz.* the constitution-making power. Our legislative power, like the co-ordinate powers, the judiciary and the executive, has its limitations. Undoubtedly, under the constitution-making power, the legislature is the highest authority; but in America, at least, the legislature is not the highest power in the land, though it may be in Germany. It is very questionable, however, if it is possible or even advisable to attempt to separate in theory the different functions of government, as so many German students insist upon doing. In practical life we suffer very little disadvantage from not possessing an exact definition of them.

As a treatise on comparative administrative law, Dr. Sarwey's work is very incomplete. In the first place, for reasons which are perhaps satisfactory, no branch of administration except internal affairs is treated at all. The administration of foreign relations, Dr. Sarwey declares, has its place in international law; and the financial administration should be treated in works on the science of finance. For omitting the administration of military affairs, he gives no reason. The administration of justice he does not consider a branch of administration proper at all. His comparison is thus confined to the rules governing the administration in the performance of all of its duties not included within the branches which he has excluded; that is, to the rules governing the administration of internal affairs.

But here again his comparison is not satisfactory — at least not to an American. For Dr. Sarwey has evidently no idea of any administrative system that is not, like the German, bureaucratic, with the fullest hierarchical organization and with great discretionary powers. An administrative system like our own, in which the officers are not subject to the instructions of any superiors, have little to do except to execute the laws, and have little or no discretion, but are subjected to the ever-present control of the courts, which can review almost all their actions, — such a system is hardly dreamt of in his philosophy of administration. Indeed, Dr. Sarwey has written his book with little or no knowledge of administrative matters on this side of the water. He hardly makes mention of the United States in his entire book.

As a treatise on comparative European administration, however, Dr. Sarwey's work is excellent. Especially good is his treatment of the

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development of administrative law and the gradual growth of the present conception of the duties of administration. The last part of the book is devoted to administrative jurisdiction in the different states of Europe. This is where Dr. Sarwey excels; it is in this field that he has made his reputation. But even here it seems to me that he has not that exact knowledge in regard to foreign law that is necessary for an accurate description of foreign institutions. Thus, for instance, in his sketch of the administrative jurisdiction in England, he omits altogether the bill of injunction as a means of judicial control over the administration; and in what he says relative to France, he speaks as if the ministers still possessed the general and ordinary jurisdiction over administrative cases, although the latest and best view is decidedly opposed to this. In general, however, his allusions to foreign law are correct, though the sources of his information are evidently secondary rather than primary.

Dr. Sarwey's method of treating the subject of administrative law is one of which I hardly approve. His exclusion of what he calls "administrative law in the narrow sense" from his chapter on the duties of the administration leads, it seems to me, to an unnecessary duplication of details and to a system of cross-references which is somewhat awkward. His conception of administrative law "in its narrow sense" is based upon the limitations placed upon administrative action by the existence of individual rights. As these exist, according to the present prevailing view, simply as a result of legal provisions, it would seem quite proper and more convenient to describe the action of the administration and these limitations upon its action at the same time.

FRANK J. GOODNOW.

Traité de la Juridiction administrative et des recours contentieux. Par E. LAFERRIÈRE, Vice-Président du Conseil d'État. — Tome I. *Notions générales et législation comparée. Histoire, organisation, compétence de la juridiction administrative.* Paris, Berger, Levrault et C^ie^, 1887. — xviii, 670 pp.

One of the most important questions that the science of administrative law has to solve is: How shall the administration be controlled in its action by judicial bodies independent of and separate from the active administration itself? This question involves the protection of the individual against the arbitrary action of the executive; and on the answer to this question, much more than on the general form of government existing in a country, depends the degree of actual liberty which its citizens enjoy. In a century which has devoted so much attention to administrative subjects, the importance of this question has naturally

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led to its frequent and extended discussion. It was treated by Gneist in his celebrated work on the *Rechtsstaat*. It was the subject of Dr. Sarwey's first work of importance and general interest. What these jurists did for Germany, M. Dareste did for France in his *La Justice Administrative*. But M. Dareste's work has become somewhat antiquated, on account of the many new questions that have come up for consideration since the establishment of the present French republic, so that no book could be more opportune than the treatise before us. Nor would it be easy to find an author better qualified for his task.

M. Laferrière's method seems to me excellent. In the first portion of the work, he gives a rapid survey of the different systems of administrative jurisdiction now in force in Europe and the United States. He then takes up the history of the French system, furnishing some very useful statistics relative to the number of affairs decided in the administrative courts of France. After this he describes the organization of the French administrative courts; and in the last book of this volume he discusses the limits of the administrative authority over against the judiciary. In the second volume, which has not yet appeared, it is his intention to treat of the limits of the administrative power, as distinguished from what the French call the governmental side of the executive power, and, after having thus delimited the domain of administrative jurisdiction, to study that domain itself in detail — that is, to study the exact competence and jurisdiction of the various administrative courts that France possesses.

To those who are not particularly interested in the details of French administrative law but who still wish to make a general study of administration, the most valuable part of the book is the part devoted to "comparative legislation." M. Laferrière classes the countries which he studies in three groups. The first group includes those countries that resemble France more or less closely; *viz.*, those that have adopted the principle of the separation of powers, established regular administrative courts, and devised a means for deciding conflicts between the administrative and the judicial powers. In this group he places, in addition to France: Spain, Portugal, the principal states of the German empire, Austro-Hungary, and certain of the Swiss cantons. He places in the second group those states in which there are not, it is true, separate administrative courts, but in which there is a complete separation of the administrative and judicial powers. In these states the ordinary courts decide all actions between individuals, no matter what may be the character of the controversy, but cannot interfere with the active administration nor annul any of its acts. The independence of the administration may be assured, if need be, by the establishment of some court for the decision of questions of competency. To this group of

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states belong: Belgium, Norway and Sweden, Denmark, Greece, the majority of the Swiss cantons, some of the smaller German states, and also Italy — though in Italy there exist a few special administrative courts. M. Laferrière's third group consists of England and the United States. Here the administrative power is not completely separated from the judicial; that is, judges may at the same time discharge administrative functions; and it is generally recognized that the courts may issue orders to administrative officers to act and may also restrain them from acting.

In his treatment of foreign legislations, M. Laferrière shows a remarkable knowledge of the administrative institutions of the different countries of the world, but it must be admitted that the descriptions that he gives differ very greatly in value. His treatment of the administrative courts of Germany, for example, and of the whole relation of the administrative to the judicial power in that country, is admirable. It is quite accurate, and I know no better presentation of the subject within anything like the same space. But his knowledge of American law, it must be said, is extremely slight. His chapter on the *États Unis d'Amérique* is not really a description of the control which the courts have in this country over the acts of administrative officers, but is simply a very short and a very misleading sketch of the American administrative system as a whole. Any one who has attempted to study American administrative law will doubtless read this chapter with a certain charity. It is almost impossible to obtain any information on the subject without going to the original sources; and this, in the case of a general work like the present, would involve a disproportionate amount of work. But M. Laferrière's mistakes are so numerous as to make his brief description of American administration almost valueless. The only book which he seems to have consulted is de Tocqueville's famous *Democracy in America*. De Tocqueville's book was written so long ago that many of the statements made in it are not now true, and the work is of so general a character that it is very questionable if it was ever a safe guide for the student of American administration. M. Laferrière says, probably on de Tocqueville's authority, that the county taxes in the United States are voted by the state legislatures. This was the case in the state of Massachusetts when de Tocqueville's book was written; but about 1830 this was changed, provision being made for a sort of county legislature in the shape of the county commissioners. But at present the statement is not true of Massachusetts nor, so far as I know, of any of our commonwealths. Again, M. Laferrière evidently misunderstands the position of the American justice of the peace. He confounds him with the English officer of the same name, and at the same time with the judges of our higher courts. Now, in the first place, the importance of the American

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justice of the peace as an administrative officer is not nearly so great as M. Laferrière supposes; and, in the second place, it is very seldom that the justice of the peace in this country exercises any control at all over the administration except through his petty civil and police jurisdiction. It is the higher courts and not the justices of the peace that have the power to review and modify or annul the acts of administrative officers. M. Laferrière's remarks, however, concerning the importance of the judicial power in this country are all quite true; and the fact that the criminal control exercised by our courts, by means of their power to punish officers for misbehavior in office, replaces the hierarchical control which we find so completely worked out in foreign administrative systems, is one which our author, I believe, is the first to formulate.

Whatever may be the faults of the first part of the work, they are amply atoned for by the portion on the law of France itself. The history of the administrative courts is admirably written, and is a striking illustration of the necessity of going to the past to understand the present. In the description of the organization of the different administrative courts, a point which demands special notice is the complete abandonment of the long-held view that the ministers have a jurisdiction in the same sense as the courts. It has long been taught that the ordinary or general administrative jurisdiction, where no special law provides another tribunal, belongs to some one of the ministers, from whom appeal may be taken to the Council of State. But M. Laferrière shows most conclusively that whatever power of decision the ministers have is simply an ordinary administrative power, and in no sense a judicial power like that which is possessed by the administrative courts.

The last part of the work is devoted to the delimitation of the administrative power over against the judicial power, and is thus an exposition of the great doctrine of the separation of powers about which so much has been written. The only thing that is new in M. Laferrière's discussion of this topic is his treatment of the question of the pecuniary responsibility of officers of the government when, by the violation of their official duties, they have injured a private individual. The student who examines the decisions collected and criticized by M. Laferrière will by no means subscribe to the view, recently taken by at least one eminent English writer, that French administrative officers cannot be sued for damages in the ordinary judicial courts. Case after case is cited where officers have been sued and the plaintiffs have gained their cases.

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